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Trauma and the Paradox of Asylum Seekers' Credibility

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"Madness, in its wild [. . .] words, proclaims its own meaning; in its chimeras, it utters its secret truth."

MICHEL FOUCAULT, *Madness & Civilization*

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Abstract

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Asylum Seekers' Credibility**

by Jennifer UMBERG

Oftentimes those fleeing persecution have only their testimony as evidence for their asylum claims. This leaves asylum officers and Immigration Judges with the task of assessing the credibility of each individual's story. If an applicant is found not credible, his or her claim for asylum status will likely be denied and have little chance to successfully fight the decision on appeal. Despite the importance of credibility determinations in asylum cases, officers and Immigration Judges are afforded highly subjective leeway for their assessments, and advised by law to analyze applicants' "demeanor" and "candor." The credibility assessment presents a unique conundrum: asylum seekers who are traumatized (oftentimes due to the reasons they fled persecution) may have a more challenging time presenting a coherent testimony. Those without access to legal counsel—or an advocate to request an affidavit from mental health experts—are subject to the whim of judges and officers who take the asylum seeker's testimony as untrue. This paper examines the ways in which the U.S. asylum system discriminates against applicants with trauma-related psychosocial disorders. In particular, it examines who gains access to mental health experts as a means to support their testimony, and ways in which this evidence is used. The lack of quality control with regards to asylum cases offers unique insight into how part of the U.S. legal system is stacked against some of the most vulnerable claimants, intended to be protected under U.S. law.

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List of Abbreviations

BIA	Board (of) Immigration Appeals
CBP	Customs (and) Border Protection
DHS	Department (of) Homeland Security
EOIR	Executive Office (for) Immigration Review
ICE	Immigration (and) Customs Enforcement
IJ	Immigration Judge
INA	Immigration (and) Nationality Act
INS	Immigration (and) Naturalization Services
PTSD	Post-Traumatic Stress Disorder
UNHCR	United Nations High Commissioner (for) Refugees
USCIS	United States Citizenship (and) Immigration Services

*For all asylum seekers whose invisible scars have been met with
uncertainty over understanding. For those who persisted.*

Chapter 1

Credibility assessments in the United States Asylum System

In his closing statement, the Immigration Judge proclaimed that “it would not be unusual for a victim of trauma to confuse dates or sequences of events, but it would be very unusual to simply forget that an event occurred.” The judge was referring to the number of times Ms. Zeru claimed she was raped; her count crept from one to three over the course of her case proceedings, and this inconsistency served as the death knell to Zeru’s claim for political asylum.

Zeru fled to the United States after becoming involved in the Eritrean Liberation Front-Revolutionary Council (ELF-RC), a former Eritrean group that had fought for independence from Ethiopia. She was imprisoned for six months for handing out pamphlets and fundraising for the group. During her confinement, she was repeatedly raped and beaten. Zeru received treatment for severe depression after her release. Several years later, the liberation group’s failed coup attempt brought more attention to Zeru. She was detained and interrogated twice more for short periods. When her name appeared on an internal government list of ELF-RC affiliates, Zeru left for the United States with her husband.

At her asylum hearing in front of an Immigration Judge (IJ), Zeru testified about her political activities, and her detainment. During her first court hearing, she claimed she had been raped once, though during cross-examination at a later hearing she stated she had been raped twice. Zeru and her attorney also presented a medical report from a female clinical psychologist, who diagnosed Zeru with Post-Traumatic Stress Disorder (PTSD); the report also referenced details of the psychologist’s interview with Zeru, including that Zeru said she had been raped three times.

When the Immigration Judge denied Zeru’s case, she appealed to the immigration board. She was again denied. Zeru could not accept the first Immigration Judge’s ruling on her credibility, which all other rejections used as reference. So she challenged the courts a third time and moved to reopen. She argued that she feared for her life because

of her *political* activities; the number of times she was raped is immaterial to her case. The decision was denied.

On yet another attempt to reopen her case, Zeru brought with her letters from three other psychologists who had seen or treated Zeru; another psychological evaluation affirming Zeru's PTSD diagnosis; and a report from a forensic psychologist who reviewed the *first* psychological evaluation for consistencies and concluded that: Zeru "recall[ed] feeling dissociated from her body during these rapes" and "utiliz[ing] avoidant strategies" and concluded "from the perspective of the psychology of trauma, the presence of dissociative symptoms in fact adds believability to [Zeru's] report."

Twelve years after Zeru filed her asylum application, the First Circuit Court of Appeals finally agreed to hear Zeru's case. However, the Court denied her claim for asylum referring to the decision of the *first* Immigration Judge. The Circuit Court stated that irrespective of the number of times Zeru was raped, the IJ based his decision on other factors such as the "demeanor" of Zeru and her husband. To support this, the judge used the circular reasoning to explain Zeru's husband was not credible because his demeanor "was one of a person who completely lacked v[e]racity."¹

Zeru is one of too many asylum seekers with trauma-related disorders that are faced with enormous challenges to gaining protection in the United States. A handful of factors in the United States' legal, health, and social systems create a morass that can make it absurdly difficult for an asylum seeker to simply assert her own truth.

1.1 Defining asylum in the United States

The Immigration and Nationality Act (INA)² is the applicable law determining asylum adjudications in the United States. There are two ways that a person may apply for asylum in the U.S.: through an affirmative asylum application, or in a defensive application.³ In either process, the applicant must establish that he or she is (1) is already "physically present" in the country, or seeking to enter the United States through a port of entry;⁴ (2) has followed the procedures to apply for asylum (e.g. has applied within

¹ Zeru v. Gonzales, 503 F.3d (1st Cir. 2007). (Also note that Zeru had hearings with two different Immigration Judges ahead of her first rejection. One IJ heard Zeru's case multiple over a number of years, before Zeru's case was reassigned to a second IJ who finally provided a decision. I refer to the second IJ as the "first" Immigration Judge for simplicity as it represents the first verdict for her case and this is the judge who was quoted in later appeals decisions.)

² Immigration and Nationality Act, U.S. CITIZENSHIP & IMMIGR. SERVS., Updated February 2013, <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html>

³ Schroeder, Jeanette L. "The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms." *BUL Rev.* 97 (2017): 319.

⁴ 8 U.S.C. §1158(a)(1).

the specified time limit);⁵ and (3) has a profile that fits within the INA's definition of a "refugee."⁶

The INA defines a refugee as:

*"[A]ny person who is outside any country of such person's nationality [...] and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."*⁷

A person applying for affirmative asylum must submit an application to the United States Citizenship and Immigration Services (USCIS) within one year of entering into the United States, along with any documentation to support their claim.⁸ The USCIS then schedules an interview between the applicant and an USCIS officer— known as an asylum officer.⁹

If the asylum-seeker's application is rejected, he/she is placed in "removal proceedings" under the Executive Office for Immigration Review (EOIR); under removal proceedings, the applicant can again assert his/her claim for asylum in front of an Immigration Judge.¹⁰

A defensive application for asylum *starts* with "removal proceedings." If an immigrant is "apprehended (caught)" by U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE) entering or residing within the United States without current legal immigration status or documentation, he or she is placed in removal (or expedited removal) proceedings and can ask for asylum.¹¹ CBP or ICE may

⁵ Id. §1158(b)(1)(A); *see also* Id. §1158(a)(2) (listing exceptions to noncitizens' right to apply for asylum in the United States).

⁶ Id. §1158(b)(1)(B)(i).

⁷ 8 U.S.C. §1101(a)(42)(A).

⁸ "Learn About the Asylum Application Process." USCIS, Accessed 23 September 2011, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum>

⁹ U.S. Citizenship & Immigration Servs. & U.S. Exec. Office for Immigration Review, *Questions and Answers: DHS Procedures for Implementation of EOIR Background Check Regulations for Aliens Seeking Relief or Protection from Removal*, August 22, 2011, https://www.uscis.gov/sites/default/files/USCIS/Laws/Laws%20Static%20Files/EOIR_Q_A%202011_FINAL.pdf; Schroeder, Jeanette L. "The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms." *BUL Rev.* 97 (2017): 326.

¹⁰ Immigration Equality, Asylum Manual §26.1 (3d ed. 2006), <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/> [https://perma.cc/9HZ8-UVPF]; Obtaining Asylum in the United States, U.S. Citizenship & Immigr. Servs., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [https://perma.cc/UUP4-SLCD] (last updated Oct. 19, 2015) (comparing the affirmative and defensive asylum processes).

¹¹ "Obtaining Asylum in the United States," U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [https://perma.cc/UUP4-SLCD] (last updated Oct. 19, 2015) (comparing the affirmative and defensive asylum processes).

then refer the immigrant to EOIR.¹² The asylum-seeker then files for asylum, and has an “adversarial hearing” in front of an Immigration Judge.¹³

An asylum seeker whose case (whether originally affirmative or defensive) has been denied by an Immigration Judge, can appeal to the Board of Immigration Appeals (BIA). If the BIA affirms a judge’s rejection, the applicant can then petition the corresponding circuit court of appeal to review the BIA decision.¹⁴

In 2016, USCIS received 65,218 asylum applications—both affirmative and defensive—and issued decisions to 52,109 applicants.¹⁵ The grant rate has been steadily decreasing over the last five years. In 2016, 43 percent of applicants received asylum status¹⁶—a 17 percent decrease since 2012.¹⁷

1.2 Making a distinction

Of note, applying for asylum and applying for refugee status are two different processes in the United States. Those applying for refugee status in the United States apply from outside of U.S. territory, whereas those applying for asylum status are already within the United States.¹⁸ In both cases, a person must prove he or she fits into the INA’s definition

¹² Schroeder, *Supra* Note 3; Hanus, Richard, “Who Ends Up in Removal Proceedings,” LAW OFFICES OF RICHARD HANUS: RICHARD’S BLOG (Mar. 9, 2013), <http://www.usavisacounsel.com/articles/who-ends-up-in-removal-proceedings.htm> [<https://perma.cc/8WJ8-N2KN>]; Obtaining Asylum in the United States, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [<https://perma.cc/UUP4-SLCD>] (last updated Oct. 19, 2015) (comparing the affirmative and defensive asylum processes).

¹³ “Obtaining Asylum in the United States,” U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [<https://perma.cc/UUP4-SLCD>] (last updated Oct. 19, 2015) (comparing the affirmative and defensive asylum processes).

¹⁴ 8 U.S.C. §1252(b)(2) (2012); *see also* AM. BAR ASS’N, TIPS FOR APPEALING TO THE BOARD OF IMMIGRATION APPEALS (BIA) 2 (2006), http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/tips_bia_appeals2006.authcheckdam.pdf

¹⁵ Department of Justice, Executive Office for Immigration Review, FY 2016 *Statistics Yearbook*, March 2017, J1, J2, available at: <https://www.justice.gov/eoir/page/file/fysb16/download>

¹⁶ *Ibid*, K1.

¹⁷ *Ibid*, K4.

¹⁸ For those applying abroad for refugee status in the U.S., the vast majority of applicants have first been screened by the United Nations High Commissioner for Refugees (UNHCR); UNHCR determines a person to be a refugee under international legal standards, then refers vulnerable refugees to the United States Refugee Admissions Program (USRAP) where the review process begins with USCIS and relevant security agencies. If USCIS determines a person is ineligible for refugee status, the applicant cannot appeal the decision. (See: “U.S. Refugee Admissions Program FAQs.” *U.S. Department of State*, n.d. <http://www.state.gov/j/prm/releases/factsheets/2017/266447.htm>.) Both the refugee process abroad, and the affirmative asylum application falls under the purview of the USCIS, which is under the Department of Homeland Security. However, as many asylum seekers find themselves in removal proceedings (in front of an Immigration Judge, the BIA, or Court of Appeals), the majority falls under the Department of Justice. In contrast, a person applying for refugee status is *only* in contact with the DHS (and relevant security agencies for screening purposes).

of “refugee” cited above. Consequently, (and understandably) the terms “refugee” and “asylum” are used interchangeably in colloquial language.

This paper focuses specifically on the U.S. asylum application process for two important reasons. First, since many asylum seekers come in contact with the U.S. justice system, I aim to explore how a particular population (asylum seekers with psychosocial disorders) are treated by the United States government given the expectation of a certain standard of quality and fairness embedded in the country’s legal system. Second, the stakes are particularly high for applicants applying for asylee status in the U.S. While refugees who are unsuccessful in their applications to live in the U.S. are still granted protection under the United Nations and have a shot to be resettled in an alternate safe country, an unsuccessful asylum application may result in “imminent deportation.”¹⁹

1.3 How to establish a claim

There are several elements involved in establishing eligibility for asylum status. First, the applicant must establish that he or she has a “well-founded fear” of persecution. Courts and scholars consider “well-founded fear” to have both subjective and objective elements; the applicant must prove she is 1) in a state of fear (subjective)²⁰, and 2) that a “reasonable person in [her] circumstances would fear persecution.”^{21 22}

To establish “well-foundedness,” the applicant might point to past persecution as an indicator that she or he can reasonably expect similar harm to occur if the applicant returns to her or his country of origin. However, past persecution is not necessary to prove that the applicant has a well-founded fear of future harm. The applicant can establish that he or she has a protected characteristic, and that his/her persecutor can come into knowledge of this characteristic and has the “inclination” and “capability” to pursue the applicant.²³ For example, the applicant might argue that he/she is a member of the LGBTQ community in a conservative country where sodomy laws define homosexuality as a crime; the applicant need not have come in contact with the state, but

¹⁹ Of note, if a refugee applicant is rejected by the US., UNHCR continues to keep the person under its protection mandate, and might refer them to alternate countries for resettlement (See: Kacou, Amien. “Can You Appeal a USCIS Denial of a Refugee Application?” *Www.Nolo.Com*, n.d. <https://www.nolo.com/legal-encyclopedia/can-you-appeal-uscis-denial-refugee-application.html>.)

Schroeder, Jeanette L. “The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms.” *BUL Rev.* 97 (2017): 326.

²⁰ The BIA has defined the term as “a genuine apprehension or awareness of danger in another country” 8 U.S.C. §1101(a)(42)(A); see also *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

²¹ *Acosta*, 19 I. & N. Dec. at 212 (“[T]his requires [an applicant] to show his fear has a solid basis in objective facts or events . . .”)

²² The Court of Appeals for the Ninth Circuit has defined persecution as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.” *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996).

²³ *Matter of Mogharrabi*, 19 I&N Dec. 439 (B.I.A. 1987)

establishing that he/she has a chance of being pursued by the state by nature of being gay is sufficient to warrant fear of future persecution.

1.4 Supporting their case

The burden of proof in establishing an asylum case rests on the asylum applicant.²⁴ Oftentimes, asylum applicants are unable to present supporting documents for their claims. This is for a variety of reasons, including the applicant's fear that their persecutor might retaliate if they collect information; time restrictions when quickly fleeing the country; fear that one's family might be subject to repercussions should he/she request others to collect documentation on his/her behalf; and lack of trust-worthiness in public records in one's home country.²⁵ As one legal author summarized: "[p]ersecutors usually don't leave a note with the persecuted person documenting the persecution that has transpired."²⁶

The applicant's claim may then boil down entirely to his or her testimony. Indeed, asylum officers are advised that "[c]redible testimony alone may be sufficient to meet the applicant's burden."²⁷ As a result, the credibility assessment often becomes "the single most important step" determining the outcome of an asylum seekers' application, rendering it the "focus" of much of asylum officers' and immigration judges' work.²⁸

²⁴ "Adjudicator's Field Manual - Redacted Public Version \ Chapter 11 Evidence. \ 11.1 Submission of Supporting Documents and Consideration of Evidence." United States Citizenship and Immigration Services (USCIS). Accessed September 25, 2017. <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2061/0-0-0-2073.html#0-0-0-312>; also see *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)

²⁵ Kagan, Michael, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 371-372 (2003); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984); Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 122 (2006) ("[P]ersons escaping persecution may leave behind important documents (such as identity cards, birth certificates, medical records, etc.) when fleeing their countries . . . in an attempt to conceal their identities from persecutors.").

²⁶ Bay, Tina, *Ninth Circuit Rejects Asylum Claim of Chinese Christian Man: Divided Panel Rules Credible Hearsay Testimony Not Weighty Enough to Establish Threat of Future Persecution*, METRO. NEWS-ENTERPRISE (July 24, 2006), <http://www.metnews.com/articles/2006/guxx072406.htm> [<https://perma.cc/NM6W-CUSS>]

²⁷ United States Citizenship and Immigration Services, RAIO Directorate- Officer Training, *RAIO Combined Training Course: Well-Founded Fear (Training Module)*, 21 February 2012, 10-11. Accessed September 25, 2017. available at: [https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20offices/RAIO/Well%20Founded%20Fear%20LP%20\(RAIO\).pdf](https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20offices/RAIO/Well%20Founded%20Fear%20LP%20(RAIO).pdf); also see *Carvajal-Munoz v. INS*, 743 F.2d 563, 579 (7th Cir. 1984) ("When objective evidence does not exist . . . the applicant's own testimony must set forth specific facts that give rise to an inference that the applicant was persecuted or has some other good reason to fear persecution on one of the specified grounds.").

²⁸ Kagan, *Supra* note 25 at 367, 369.

1.5 The credibility assessment

Despite the importance of the credibility assessment, there is relatively little guidance provided to asylum officers and immigration judges on how to systematically approach this step. Moreover, guidance leaves ample room for asylum officers and immigration judges to use subjective discretion.²⁹

The REAL ID ACT of 2005 amended and built out the INA's guidelines for determining credibility. It has since been codified and scattered into the INA. It advises establishing credibility based on three main indicators:

1. "the demeanor, candor, or responsiveness of the applicant";
2. "the inherent plausibility of the applicant's ... account"; and
3. "the consistency between the applicant's ... written and oral statements ..., the internal consistency of each such statement, ... and any inaccuracies or falsehoods in such statements."³⁰

Despite the law's vague language, Michael Kagan points out that there is "little [statutory] guidance about how [these indicators] should be weighed against each other to reach a final decision."³¹ Consequently, when immigration judges apply these standards they are left "grasping at straws."³²

Additionally, the INA makes clear that there is no presumption of credibility when assessing asylum seekers' testimony.³³ (This differs from the presumption of credibility afforded to asylum cases adjudicated in Canada, and at UNHCR. It also differs from the UK's clear guidance on "mitigating factors" in determining credibility.³⁴)

In practice, credibility determinations in asylum cases "still depend critically on personal judgment," which often comes down to "[e]motional impressions" and "gut

²⁹ Schroeder, *Supra* note 3 at 327.

³⁰ 8 U.S.C. §1158(b)(1)(B) (2012).

³¹ Kagan, *Supra* note 25 at 368.

³² Judge Richard Posner of the Seventh Circuit criticizing DHS standards around credibility in *Djouma v. Gonzales*, 429 F.3d 685, 688 (7th Cir. 2005). *As cited in*: Melloy, Katherine E. "Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers." *Iowa L. Rev.* 92 (2006): 637.

³³ 8 U.S.C. §1158(b)(1)(B) (2012). ("There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.") *Also see*: Schroeder, 319 ("In the absence of persuasive corroborating evidence of persecution, an immigration judge's finding that an asylum applicant's narrative is not sufficiently credible.")

³⁴ Lawrance, Benjamin N., and Galya Ruffer. *Adjudicating Refugee and Asylum Status*. Cambridge University Press, 2015.

feelings.”³⁵ Consequently, “nonverbal behavioral cues, such as smiles, accents, and eye contact, are strong determinants of an asylum applicant’s credibility.”³⁶

This brings into question whether asylum cases even follow the “preponderance of evidence” standard³⁷ for the burden of proof in civil cases.

Perhaps unsurprisingly, studies show asylum decisions depend largely on the presiding officer or judge. The Transactional Records Access Clearinghouse (TRAC) collected data between 2012 and September 2017 that shows acceptance rates of asylum seekers ranged from 90 percent to 3 percent “depending upon which immigration judge the asylum seeker was assigned.”³⁸ (For comparison, the national acceptance rate in 2016 was 57%.³⁹) A study analyzing 140,000 decisions by 225 immigration judges over a four-and-a-half-year period found “amazing disparities in grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country.”⁴⁰ For example, two judges in Miami’s federal immigration court assessing applicants from Colombia had individual acceptance rates of 5% versus 88%.⁴¹

Researchers believe a large contribution to this discrepancy is based on credibility.⁴² Despite that the REAL ID act attempted to codify the credibility process, “judge-to-judge decision disparities” has worsened by 27 percent over the past six years.⁴³

Moreover, the BIA is unlikely to overturn immigration judges’ decisions on credibility because they cannot “engage in *de novo* review of findings of fact determined by an immigration judge”⁴⁴ and the Code of Federal Regulations defines “findings as to

³⁵ Kagan, *Supra* note 25 at 368.

³⁶ Smeda, Karen. “Truth or Dare: A Framework for Analyzing Credibility in Children Seeking Asylum,” p.7, (2017); also see: Neal P. Pfeiffer, *Credibility Findings in INS Asylum Adjudications: A Realistic Assessment*, 23 TEX. INT’L L. J. 142-144 (1988).

³⁷ “The plaintiff’s burden of proof in a civil case is called preponderance of evidence. Preponderance of evidence requires the plaintiff to introduce slightly more or slightly better evidence than the defense. This can be as low as 51 percent plaintiff to 49 percent defendant. When preponderance of evidence is the burden of proof, the judge or jury must be convinced that it is “more likely than not” that the defendant is liable for the plaintiff’s injuries.” See: “2.4 The Burden of Proof | Criminal Law.” *University of Minnesota Libraries*. <http://open.lib.umn.edu/criminallaw/chapter/2-4-the-burden-of-proof/>.

³⁸ “Asylum Decisions Depend on Judge Assigned - San Francisco and Newark Have Worst Records.” *Transactional Records Access Clearinghouse, Syracuse University*.

20 November 2017. <http://trac.syr.edu/whatsnew/email.171120.html>.

³⁹ “Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality.” *Transactional Records Access Clearinghouse, Syracuse University*. December 13, 2016. <http://trac.syr.edu/immigration/reports/448/>.

⁴⁰ Ramji-Nogales, Jaya and Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 306 (2007).

⁴¹ *Ibid*, 296.

⁴² Schroeder, *Supra* note 3 at 329.

⁴³ “Asylum Outcome Increasingly Depends on Judge Assigned.” Accessed September 26, 2017. <http://trac.syr.edu/immigration/reports/447/>.

⁴⁴ 8 C.F.R. §1003.1 (2016).

the credibility of testimony” as “findings of fact.”⁴⁵

⁴⁵ 8 C.F.R. §1003.1(d)(3)(i)

Chapter 2

Trauma amongst refugees, and the impact of trauma on memory

2.1 Trauma-related disorders amongst asylum seekers

Research shows that traumatic events relate to the onset of a number of psychosocial disorders, including Post Traumatic Stress Disorder (PTSD), depression, and anxiety.¹ Considering asylum seekers and refugees often experience pre-migration events such as torture, sexual violence, war, forced labor, or witnessed violence against a loved one,² these displaced communities express trauma-related disorders at a higher rate.

While epidemiologists studying asylum seekers offer widely varying rates of trauma-related psychosocial disorders, their studies consistently demonstrate a significantly higher prevalence compared to the general American public.³ Studies estimate that PTSD among refugees range from 30-80 percent⁴ (the prevalence amongst the general

¹ Wilson, R. M., Murtaza, R. and Y. B. Shakya (2010). Pre-migration and Post-migration Determinants for Newly Arrived Refugees in Toronto. Canadian Issues: Immigrant Mental Health. Summer 2010: 45-50.

² Gojer, Julian, and Adam Ellis. *New Issues in Refugee Research: Post-Traumatic Stress Disorder and the Refugee Determination Process in Canada: Starting the Discourse*. United Nations High Commissioner for Refugees (UNHCR) p.7, 2014, *New Issues in Refugee Research: Post-Traumatic Stress Disorder and the Refugee Determination Process in Canada: Starting the Discourse*, www.unhcr.org/research/working/53356b349/post-traumatic-stress-disorder-refugee-determination-process-canada-starting.html; also see: "PTSD in Refugees." PTSD: National Center for PTSD, U.S> Department of Veterans Affairs, 5 July 2007, www.ptsd.va.gov/professional/trauma/other/ptsd-refugees.asp.

³ Hollifield, M., Warner, T.D., Lian, N., Krakow, B., Jenkins, J.H., Kesler, J., Stevenson, J., & Westermeyer, J., *Measuring trauma and health status in refugees: A critical review*, Journal of the American Medical Association, 611-621 (2002). See also, Elisa E. Bolton, *PTSD in Refugees*, available at <http://www.ptsd.va.gov/professional/trauma/other/ptsd-refugees.asp>; UN High Commissioner for Refugees (UNHCR), *UNHCR Resettlement Handbook*, 2011, July 2011, available at: <http://www.refworld.org/docid/4ecb973c2.html>

⁴ Lee, Katherine. "Seeking Sanctuary." *American Psychological Association*, August 2017. <http://www.apa.org/monitor/2017/07-08/sanctuary.aspx>; Also see: Hollifield, M., Warner, T.D., Lian, N., Krakow, B., Jenkins, J.H., Kesler, J., Stevenson, J., & Westermeyer, J., *Measuring trauma and health status in refugees: A critical review*, Journal of the American Medical Association, 611-621 (2002). See also, Elisa E. Bolton, *PTSD in Refugees*, available at <http://www.ptsd.va.gov/professional/trauma/other/ptsd-refugees.asp>. (Research on PTSD among refugees has found widely varying rates, with the prevalence of trauma ranging

American population is 7.8%).⁵ Moreover, asylum seekers (as opposed to refugees) are expected to be on the higher end of this prevalence rate given their precarious legal status and lack of economic opportunity.⁶ A more recent study published in 2017 examined asylum seekers in Texas from Central America and found that amongst the population, 32% “met the diagnostic criteria” for PTSD, 24% for depression, and 17% for both.⁷ In a 2013 presentation, psychiatrist Howard Zonana revealed that at Yale Law School’s Asylum Clinic, 84% of their clients tested for PTSD, 61% tested for depression, and 9% tested for “cognitive limitations.”⁸ Studies also show that psychological sequela as a result of trauma expresses itself at higher rates and persists for longer amongst asylum seekers who are kept in detention.^{9 10}

from 4% to 86% depending on sample size, country of origin, and other factors. Though most studies site upwards of 30%)

⁵ National Center for PTSD, “Facts about PTSD,” last updated: July 2016, <https://psychcentral.com/lib/facts-about-ptsd/>.

⁶ Lee, Katherine. “Seeking Sanctuary.” *American Psychological Association*, August 2017. <http://www.apa.org/monitor/2017/07-08/sanctuary.aspx>.

⁷ Keller, Allen, et al. “Pre-Migration Trauma Exposure and Mental Health Functioning among Central American Migrants Arriving at the US Border.” *PloS one* 12.1 (2017): e0168692.

⁸ Moran, Mark. “Psychiatrists Have Role in Assessing Candidates for Asylum.” *Psychiatric News*, American Psychiatric Association, 12 June 2013, psychnews.psychiatryonline.org/doi/full/10.1176%2Fappi.pn.2013.6b15.

⁹ *Ibid.*; Steel Z, Silove D, Brooks R, Momartin S, Alzuhairi B, Susljik INA. Impact of immigration detention and temporary protection on the mental health of refugees. *Brit J Psych*, 2006;188: 58–64.

¹⁰ A number of mental health professionals in this line of work have also voiced their skepticism of diagnosing asylum seekers according to criteria developed in Western nations. For example, Gojer and Ellis argues that since PTSD is “a psychiatric category [that] is not a biologically pre-determined disorder which the medical model compartmentalizes,” it forms a “truth” that excludes certain people from its criteria (See: Gojer, Julian, and Adam Ellis. *New Issues in Refugee Research: Post-Traumatic Stress Disorder and the Refugee Determination Process in Canada: Starting the Discourse*. United Nations High Commissioner for Refugees (UNHCR) p.7, 2014, *New Issues in Refugee Research: Post-Traumatic Stress Disorder and the Refugee Determination Process in Canada: Starting the Discourse*, www.unhcr.org/research/working/53356b349/post-traumatic-stress-disorder-refugee-determination-process-canada-starting.html). The National Center for PTSD also notes that “[r]esearchers’ ability to draw conclusions” when assessing refugees’ psychological distress “is limited because many evaluation measures have not been adequately translated into the refugees’ native languages and are not sensitive to the refugees’ cultural norms.” (See: “PTSD in Refugees.” *PTSD: National Center for PTSD*, U.S. Department of Veterans Affairs, 5 July 2007, www.ptsd.va.gov/professional/trauma/other/ptsd-refugees.asp). While more reliable, culturally-appropriate and linguistically-validated forms of assessment have emerged, these critiques remain relevant to the asylum application process. (For instance, the Harvard Trauma Questionnaire has become a gold-standard amongst psychiatrists in the field. The National Center for PTSD also notes the reliability of the Resettlement Stressor Scale, and the War Trauma Scale as well.) Psychiatrist Derek Summerfield notes, that: “The psychiatric sciences have sought to convert human misery and pain into technical problems that can be understood in standardized ways and are amenable to technical interventions by experts. But human pain is a slippery thing [...] how it is registered and measured depends on philosophical and socio-moral considerations that evolve over time [...]” (See: Summerfield, Derek. “The invention of post-traumatic stress disorder and the social usefulness of a psychiatric category.” *BMJ: British Medical Journal* 322.7278 (2001): 95.)

2.2 Psychosocial disorders and narrative

Ironically, trauma-related psycho-social disorders actually mimic the same traits that underpin many adverse credibility determinations.

Studies show PTSD and depression can affect one's memory.¹¹ Symptoms might include, disassociation, avoidance, cognitive disruptions (i.e. re-experiencing an event), diminishing or exaggerating certain events, and denial.¹² These symptoms run counter to the guidance for assessing the credibility of an applicant's refugee claim, which instructs officers to look for internal consistency, coherency, detail, and personalization.¹³ As Meffert and her colleagues note, patients of PTSD and related disorders often retain "memories of traumatic events [that] are characteristically fragmented, are difficult to arrange chronologically, and can be suppressed altogether."¹⁴

Those who have experienced a traumatic event might avoid discussing the event,¹⁵ and, at times, not be conscious that he or she is avoiding talking about the subject or related topics that might trigger a "recall."¹⁶ According to a manual sponsored by the United Nations and European Refugee Fund of the European Commission, asylum seekers may appear "distracted[,] detached, and/or unwilling to cooperate" and

¹¹ J Herlihy, S Turner, 'The Psychology of Seeking Protection', *International Journal of Refugee Law*, vol. 21, no. 2, 2009, p 171–92 at p. 176; J Herlihy, L Jobson, S Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum', *Applied Cognitive Psychology*, vol. 26, no. 5, 2012, p 661–76; also see: J Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers', *International Journal of Refugee Law*, vol. 13, no. 3, 2001, p 293–309; see also Australian Government, *Guidance on Vulnerable Persons*, Migration Review Tribunal and Refugee Review Tribunal, June 2012, paras 64 and 92.

¹² Brewin, Chris R. "Autobiographical memory for trauma: Update on four controversies." *Memory* 15.3 (2007): 227-248; Brewin, Chris R. "A cognitive neuroscience account of posttraumatic stress disorder and its treatment." *Behaviour research and therapy* 39.4 (2001): 373-393; Anderson, M. C., and C. Green. "Suppressing Unwanted Memories by Executive Control." *Year Book of Psychiatry and Applied Mental Health* 2002.1 (2002): 343-344.

¹³ Meffert, et. al, 484.

¹⁴ Meffert, Susan M., Karen Musalo, Dale E. McNiel, and Renée L. Binder. "The Role of Mental Health Professionals in Political Asylum Processing," *The Journal of the American Academy of Psychiatry and the Law* 38, no. 4 (2010), 484.

¹⁵ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders (4th edn.)*, Washington DC: American Psychiatric Association, 1994; See also Swedish Migration Board (Migrationsverket), *Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection*, 28 March 2001, p.14. ("The description of a chain of events can be made less detailed or specific because a woman may not want to remind herself about all the details and circumstances. This should be kept in mind when evaluating the information a woman provides.") Also see: D Bögner, J Herlihy, C Brewin, "Impact of Sexual Violence on Disclosure during Home Office Interviews," *British Journal of Psychiatry*, vol. 191, no. 1, 2007, p 75–81; see also EAC Module 7, section 4.2.5: ("Traumatised persons may not wish to report and to discuss all the details of their experiences. [...] One of the diagnostic features of PTSD is that the individual makes efforts not to have conversations associated with the trauma. During an interview it will be possible that the claimant will switch into an avoidance response.")

¹⁶ J Herlihy, L Jobson, S Turner, "Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum," *Applied Cognitive Psychology*, vol. 26, no. 5, 2012, p 661–76.

"indifferent", though it warns this is often "mistakenly interpreted as [...] lacking credibility."¹⁷

¹⁷ High Commissioner for Refugees (UNHCR), *Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report*, p.62, May 2013, available at: <http://www.refworld.org/docid/519b1fb54.html>

Chapter 3

Methodology

In surveying this topic, I employ a mixed method with a mainly qualitative approach. I review several different types of sources— both primary and secondary— from the perspective of relevant stakeholders, including asylum officers and immigration judges, legal professionals that represent asylum applicants, and mental health professionals.

My thesis will primarily focus on a review of qualitative secondary sources. I weigh these most heavily since fairly quantifying the impact of trauma-related disorders and the poor integration of specialists in the process would require an understanding of how many applicants in the system go un-diagnosed. I also focus largely on secondary sources as it is difficult to gain access to unpublished asylum cases and psychological assessments of asylum seekers due (understandably) to concerns over confidentiality.

I collected these secondary sources using Columbia Library's database, Oxford's Refugee Studies Center open source archive, Refworld, and Google Scholar. Secondary sources include research evaluating how decision makers in the asylum process have interpreted psychological assessments as it relates to the credibility of an asylum applicant; and research on how applicants have been affected by the current asylum process from the perspective of legal advocates and mental health professionals.

While the thrust of this paper relies on secondary sources, I also corroborate this research with my own analysis of primary sources, namely, relevant training manuals for legal professionals and available BIA cases determined since 2010. Additionally, interviews with several professionals (asylum advocates, mental health professionals) offer anecdotal evidence that served to support secondary sources already available.

Chapter 4

Findings

Research indicates there are several issues that inhibit asylum seekers from fairly interfacing with the U.S. asylum system. Section I of this chapter will discuss the main obstacles facing the general population of asylum seekers. Section II explores ways in which these issues particularly affect asylum seekers experiencing trauma-related mental health issues. In Section III, a case is presented to illustrate the impact of these issues on courts' credibility assessments and willingness to accommodate traumatized asylum seekers.

Through research and interviews, it also became apparent that detention exacerbates the challenges faced by traumatized asylum seekers, and puts them at increased risk of re-traumatization. The following chapter will explore the unique issues faced by this subset of the asylum seeker population in the United States.

4.1 General problems facing asylum seekers

4.1.1 Access to counsel

Access to legal representation is one of the largest determinants of an asylum seeker's success in his or her case.¹ To put this in perspective, in 2016, asylum seekers who had legal representation were five times more likely to succeed in their claims, than those who did not; those with legal counsel were rejected in 48 percent of cases, whereas those *without* counsel were rejected 90 percent of the time.²

So what proportion of asylum seekers pursue a claim *without* representation? This is a surprisingly complicated question. The short answer is: somewhere between 20 percent and 63 percent.³ The government determines "representation rates" by tallying

¹ Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1002-1004 (2015).

² "Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality." *Transactional Records Access Clearinghouse*, Syracuse University. December 13, 2016.

³ Low estimation based on TRAC records; high estimation based on Eagly and Shafer study. See: *Supra* note 2; also see: Eagly, Ingrid V., and Steven Shafer. "A National Study of Access to Counsel in Immigration Court." *U. Pa. L. Rev.* 164 (2015): 1.

each proceeding, rather than looking at the proportion of represented *cases*.⁴ Yet, a recent study shows that legal representation increases the likelihood that an asylum seeker will have multiple proceedings; consequently, the government's calculation "artificially inflates representation rates."⁵ The widely cited Transactional Records Access Clearinghouse (TRAC)—which uses records from the Department of Justice—suggests that 80 percent of asylum seekers received representation in 2016.⁶ In contrast, legal scholars who looked at representation rates by *case* determined only 37 percent of immigrants had counsel between 2007 and 2012.⁷ While those filing a claim for asylum likely had a higher rate of representation compared to their other immigration cases, the decision to apply for asylum appears to be influenced by access to an attorney in the first place.⁸

According to TRAC, the rate of those facing immigration proceedings without representation has *increased* between 2010 and 2016.⁹ This claim is not in dispute irrespective of how representation is calculated.

Determinants in accessing legal counsel include one's financial resources, location, and social network.

Finding *pro bono* or low-cost legal counsel is especially challenging given the growing backlog of asylum cases, and the limited number of firms, attorneys and non-profits offering their services.¹⁰ Sources estimate that while some *pro bono* counsel is offered

⁴ Eagly, Ingrid V., and Steven Shafer. "A National Study of Access to Counsel in Immigration Court." *U. Pa. L. Rev.* 164 (2015): 7.

⁵ *Ibid.*

⁶ "Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality." *Transactional Records Access Clearinghouse, Syracuse University*. December 13, 2016. <http://trac.syr.edu/immigration/reports/448/>. (TRAC sourced this information from EOIR records through a Freedom of Information Act request).

⁷ Eagly and Shafer, 7.

⁸ Eagly and Shafer, 54. (86% of those seeking relief, including asylum, were represented by an attorney. Much research focuses on the outcome differences between represented and non-represented cases, there has been little literature on how access to counsel influences one's decision to apply for asylum in the first place. In Eagly and Shafer's recent study, they found a clear association between representation and a given case's "procedural path.").

⁹ "Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality." *Transactional Records Access Clearinghouse, Syracuse University*. December 13, 2016. <http://trac.syr.edu/immigration/reports/448/>.

¹⁰ For example, Eagly and Shafer found that out of all immigration removal proceedings, only 2% of immigrants were able to access *pro bono* counsel. While asylum seekers represented the largest subset of this population able to receive legal counsel, small and solo firms (those assumed to be requesting fees) represented the majority of representing "attorney types." Eagly and Shafer, 1, 8, 30. (Also see footnote 26). Also see: "'At Least Let Them Work': The Denial of Work Authorization and Assistance for Asylum Seekers in the United States." *Human Rights Watch*, November 12, 2013. <https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united>; and Newman, John, "Finding a Lawyer a Huge Obstacle for Asylum Seekers in Chicago." *Chicago Reporter*. 20 May 2015. <http://chicagoreporter.com/finding-a-lawyer-a-huge-obstacle-for-asylum-seekers-in-chicago/>. (explaining how large firm attorneys working *pro bono* cases, and law school clinics, must work around busy schedules and are hesitant to take on new cases).

at no cost, it is oftentimes the case that services will range from \$200 to \$1,250.¹¹ In other metropolitan areas in which the availability of *pro bono* counsel is more limited, sources have estimated the cost of an immigration attorney to run from \$1,000 for a “simple case” to more than \$10,000 “per family member for a complicated asylum case,” in Chicago,¹² and \$6,500 to \$20,000 (if appealing) in Atlanta.¹³

As Professor Philip Schrag has argued in the context of asylum, allowing the government to fund counsel would both “be fair to low-income asylum applicants with complex but valid cases” and “help to deter fraudulent applicants from pressing their claims.”¹⁴

Studies also show that those in rural locations are much less likely to access legal counsel than those who live in non-rural locations.¹⁵ Eagly and Shafer found that, on average, immigrants who requested “continuance” (or extra time for their case) spent some 50% of their total case time just trying to secure representation.¹⁶

4.1.2 Access to adequate counsel

The quality of legal counsel available to asylum seekers is concerning.¹⁷ Immigration law is thought to be the area of law with the largest disparity in quality of counsel.¹⁸ A

¹¹ Caplow, Stacy, et al. “Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report.” *Cardozo Law Review* 33.2 (2011): 357.

¹² Newman, John, “Finding a Lawyer a Huge Obstacle for Asylum Seekers in Chicago.” *Chicago Reporter*. 20 May 2015. <http://chicagoreporter.com/finding-a-lawyer-a-huge-obstacle-for-asylum-seekers-in-chicago/>. Also see a DC lawyer quoting a similar range: Dzubow, Jason. “How Much Should I Pay for an Asylum Lawyer?” *The Asylumist*, March 2, 2016. <http://www.asylumist.com/2016/03/02/how-much-should-i-pay-for-an-asylum-lawyer/>.

¹³ Hesson, Ted. “Why It’s Almost Impossible to Get Asylum in Atlanta.” *Vice*, June 8, 2016. https://www.vice.com/en_us/article/bn38x5/why-its-almost-impossible-to-get-asylum-in-atlanta.

¹⁴ Philip G. Schrag, *Offer Free Legal Counseling to Asylum Seekers*, *New York Times*, July 12, 2011. <https://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/offer-free-legal-counseling-to-asylum-seekers>

¹⁵ “Where You Live Impacts Ability To Obtain Representation in Immigration Court,” *Transactional Records Access Clearinghouse*, Syracuse University. August 7, 2017. <http://trac.syr.edu/immigration/reports/477/>.

¹⁶ Eagly and Shafer 61.

¹⁷ In a 2015, judges from the 7th Circuit lamented a norm of low-caliber defenses by immigration lawyers in removal proceedings. See: *Bouras v. Holder*, 779 F.3d 665 (7th Cir. 2015). (“There are some first-rate immigration lawyers, especially at law schools that have clinical programs in immigration law, but on the whole the bar that defends immigrants in deportation proceedings [...] is weak—inevitably, because most such immigrants are impecunious and there is no government funding for their lawyers.”); In a 2010 study on legal counsel in New York, Immigration Judges rated 30 % of attorneys as “inadequate” and an additional 14% of attorneys as “grossly inadequate” when representing asylum cases. See: Caplow, Stacy, et al. “Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report.” *Cardozo Law Review* 33.2 (2011): 392.

¹⁸ For example, a survey of federal judges shows “the disparity in quality of counsel between government attorneys and immigration attorneys was the largest of any of area of law.”

Posner, Richard A., & Albert H. Yoon (2011) “What Judges Think of the Quality of Legal Representation,” 63 *Stanford Law Rev.* 317–49. (as cited in Miller, see *Supra* Note 20).

recent study found that it is “actually better” for an asylum seeker to represent themselves than to be represented by inadequate counsel, and that case outcomes are driven almost as much by quality of lawyer as it is by access to lawyers.¹⁹ Case studies have described over-committed lawyers, “abandoning clients, ignoring filing deadlines, and missing hearings.”²⁰ This is also reflected in the data: amongst cases that were considered “represented,” 11 percent did not see their attorney appear at a single hearing.²¹

The low proportion of cases handled by *pro bono* attorneys is not just a tragedy as it excludes a large number of low-income asylum seekers. *Pro bono* counsel has been linked with higher quality representation, and therefore significantly higher success rates.²² Conversely, “small and solo firms” had the lowest success rates when representing clients seeking asylum;²³ yet the majority of asylum seekers with representation receive this form of counsel.²⁴

4.2 Problems facing asylum seekers with PTSD, Anxiety, and Major Depression

4.2.1 Access to counsel and the courts

Traumatized asylum seekers are poised to face additional hurdles when seeking adequate legal representation. Many of the traits of PTSD, anxiety, and depression— such as avoidance, and gaps in memory— create unfavorable conditions when seeking an attorney.

The legal community that serves asylum seekers exhibits selection-bias, cherry-picking the cases it chooses to represent. Unsurprisingly, they tend to choose to represent cases that show a comparatively clearer chance of success.²⁵ Yet, asylum seekers

¹⁹ Miller, Banks, Linda Camp Keith, and Jennifer S. Holmes. “Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability.” *Law & Society Review* 49.1 (2015): 210-211.

²⁰ Richard L. Abel, Practicing Immigration Law in Filene’s Basement, 84 N.C. L. Rev. 1449, 1452, 1477, 1482 (2006). Available at: <http://scholarship.law.unc.edu/nclr/vol84/iss5/5>.

²¹ Eagly and Shafer, 20.

²² For example, Ramji-Nogales points out Georgetown University’s clinical program had a 89% success rate in their asylum cases, compared to only 46% success rate for asylum cases handled by other attorneys the same year. See: Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296, 394-96 (2007).

²³ Eagly and Shafer, 52.

²⁴ 90 % of immigrants in removal proceedings are represented by small and solo firms. “Non-profit attorneys were also the least likely of any attorney type to represent asylum seekers: only 28% of their cases included an asylum application. This lower level of claim-seeking among nonprofits could result from a scarcity of nonprofit resources to pursue claims for all clients.” See: Eagly and Shafer, 8, 30.

²⁵ Ramji-Nogales, Jaya et al., 340, See *Supra* Note 40; Also see: Grenier, James, and Cassandra Wolos Patanayak. “Randomized evaluation in legal assistance: What difference does representation (offer and actual use) make.” *Yale LJ* 121 (2011): 2194. (discussing attorneys’ incentive to take up cases with high probability of success, and minimal work).

wishing to present “successful” claims must do so from the onset. This advantages those who can express a coherent and forthcoming narrative when first seeking counsel.

As discussed above, high-stress situations, can serve as a trigger for trauma symptoms and inhibit a person from stating even fundamental facts to their claim.²⁶ During an intake interview or screening with potential legal counsel, a traumatized asylum seeker is tasked with recounting their past trauma in the early stages of recovery, often with rudimentary practice in telling their story. The stakes at hand include: increasing one’s chance of success in court, or facing deportation. This can be reasonably classified as a high-stress situation.

From the onset, this approach by the advocate community discounts the possibility that a trauma-related disorder may affect the asylum seeker’s testimony. It presents a setback for a vulnerable subset of the asylum seeker population that, arguably, is most in need of counsel in the asylum process. As Cummins summarizes, “[a]t *all* levels, the credibility of the applicant is critical because each level of review will look to the consistent credibility of the applicant in order to analyze whether the applicant’s fear [...] is well-founded.”²⁷ Attorneys cite internal inconsistencies and lack of a clear or “legitimate” claim as reasons for refusing to take a client’s case when resources are limited.²⁸

4.2.2 One year filing deadline

Just as it may be difficult for traumatized asylum seekers to satisfactorily articulate their past persecution at a screening with legal counsel, for some, the trauma may prevent them from seeking counsel and government relief whatsoever during their first year in the United States. A number of legal scholars and advocates have made the case that the one-year filing deadline has a disproportionately adverse impact on asylum seekers experiencing trauma-related disorders.²⁹

²⁶ For example, a study on military personnel found that high-stress interrogations have caused traumatized individuals to experience greater difficulty in even identifying their own interrogators. See: Morgan CA III, Hazlett G, Doran A, *et al*: “Accuracy of eyewitness memory for persons encountered during exposure to highly intense stress.” *Int J Law Psychiatry* 265–79, 2004.

²⁷ Cummins, Maureen E. *Post-Traumatic Stress Disorder and Asylum: Why Procedural Safeguards Are Necessary*, 29 J. Contemp. Health L. & Pol’y 283 (2013). Available at: <http://scholarship.law.edu/jchlp/vol129/iss2/7> (emphasis my own).

²⁸ Elcheikh, Maya (Attorney), and Jessica Gorelick (Social Worker) (Human Rights First). Personal Interview. 3 Nov. 2017. (referring to inconsistencies or incoherency as a reason not to take clients). Also see: Adams, Lori, and Alida Y. Lasker. “The Asylum Representation Project and the Leon Levy Fellowship at Human Rights First: An Innovative Partnership to Increase Pro Bono Representation for Indigent Asylum-Seekers.” *Cardozo L. Rev.* 33 (2011): 419.

(citing their screening program for “legitimate” claims, indicating their determination on the credibility of an asylum seeker is immediate and ad hoc at the short screening session, without taking into consideration trauma).

²⁹ Cummins, *Supra* Note 29; Also see: Musalo, Karen, and Marcelle Rice. “Center for Gender & (and) Refugee Studies: The Implementation of the One-Year Bar to Asylum.” *Hastings Int’l & Comp.*

As way of background, asylum applicants must file a claim within one year of entering the United States; his or her application will not be reviewed otherwise.³⁰ The one-year filing deadline can be waived only in situations that arise from one of two possible “exceptions” recognized by the INS.³¹ First, the one-year timeline can be waived if there is a “changed circumstance” that “materially affect[s] the applicant’s eligibility for asylum.”³² An example of a changed circumstance might include changes in applicable law; the need for a *sur place* claim that emerges based on the applicant’s activities after the deadline (e.g. religious conversion); or changes in country conditions (such as a regime change) that endanger the applicant’s return.³³ Second, the one-year timeline can be waived if the applicant can prove “extraordinary circumstances” that were “directly related” to reasons as to why the applicant missed the filing deadline.³⁴ Conditions that meet INS’s threshold for “extraordinary circumstance” include “serious illness or mental or physical disability.”³⁵

PTSD, anxiety, and severe depression, all pose difficulties to completing even everyday tasks.³⁶ Yet, whether an IJ recognizes these disorders as “serious illness[es]” or mental hurdles as classified under the “extraordinary circumstances” exception is *ad hoc* and inconsistently applied across courts. This is particularly baffling in light of how such disorders fit the “directly related to” (a delay in filing) clause.

Notably, the First Circuit has held that PTSD meets the extraordinary circumstances

L. Rev. 31 (2008): 693; *Also see*: “Immigration Basics: The One-Year Filing Deadline.” *Immigration Equality*. 2015. <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-basics-the-one-year-filing-deadline/>.

³⁰ U.S. Citizenship and Immigration Servs., “Asylum Officer Basic Training Course: One Year Filing Deadline,” 5 (Mar. 23, 2009), Available at: <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBT%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf>

³¹ *Ibid.*, 6.

³² “§Sec. 208.4 Filing the Application.” *U.S. Citizenship and Immigration Servs.*, Accessed November 1, 2017. <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-14927/0-0-0-15007.html>; Auerbach, Randy. “Immigration Nationality Act: An AILA Primary Source Reference,” *Immigration Lawyers Association*, (2001): 53-54. (elaborating on changed circumstances exception for filing deadline under INA §208(a)(2)(B)).

³³ “§Sec. 208.4 Filing the Application.” *U.S. Citizenship and Immigration Servs.*, Accessed November 1, 2017. <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-14927/0-0-0-15007.html>.

³⁴ *Ibid.*, at 4(ii).

³⁵ *Ibid.*

³⁶ “Post-Traumatic Stress Disorder (PTSD) - Symptoms and Causes” *Mayo Clinic*. Last updated 25 October 2017. <https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967>; “Depression.” *National Institute of Mental Health*. Last updated October 2016. <https://www.nimh.nih.gov/health/topics/depression/index.shtml>; “Generalized Anxiety Disorder: When Worry Gets Out of Control.” *National Institute of Mental Health*. Last Updated 2016. <https://www.nimh.nih.gov/health/publications/generalized-anxiety-disorder-gad/index.shtml>.

exception.³⁷ Though, a minority of cases fall in the jurisdiction of the First Circuit,³⁸ and asylum seekers filing in other districts are not protected by this legal precedent.³⁹

Take, for example, the case of a Gambian woman who had been raped and severely beaten by her husband over the course of two decades.⁴⁰ When she arrived in the U.S., she was in such a state of fear and trauma that she felt compelled to move continuously within the country for two years “to avoid detection.”⁴¹ After learning through a Catholic Charity that she was eligible for asylum, she filed a late application; the asylum officer denied waiving her filing deadline since she exhibited “the ability to make appropriate life decisions, to have ongoing employment, [and] to be able to relocate to take advantage of opportunities.” Moreover, he rejected the woman’s forensic evaluation confirming she suffered from PTSD and Major Depressive Disorder, because the evaluator was not treating the woman on “a continuing basis.”⁴²

The BIA reversed the decision on appeal.⁴³ However, this is concerning for a number of reasons. The Immigration Judge’s statement about “relocating” fundamentally contradicts the notion that those most in fear due to past persecution are relocating for the purpose of seeking relief; in this case, the woman could have been moving to seek relief from her husband (and her perception that multiple moves were necessary could be a result of PTSD). This also indicates a disconnect between immigration judges’ understanding of the role of medical professionals, and the ethics required of medical professionals. Medical practitioners repeatedly emphasized the need to separate the forensic evaluation process from medical treatment, as a way to retain objectivity and clear boundaries between the role of “evaluator” and “advocate.”⁴⁴ Despite such basic misunderstandings, immigration judges are rarely terminated; for example, between

³⁷ *Mukamusoni v. Ashcroft*, 390 F.3d 110 (1st Cir. 2004).

³⁸ In 2016, Newark—the most northern asylum office on the East Coast discounting New York City (which is covered by the 2nd District Court of Appeals)—took in 10 percent of the asylum caseload for the year. See: “Asylum Office Workload: September 2016.” USCIS. https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_AffirmativeAsylumStatisticsSeptember2016.pdf

³⁹ “The decision of a court has precedent value only within the court’s territorial jurisdiction.” See: “Decisions of Federal Courts.” *Adjudicator’s Field Manual - Redacted Public Version: Section 14.5*, United States Citizenship and Immigration Services. Accessed October 14, 2017. <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2281/0-0-0-2368.html>.

Only a few select cases, as determined by the BIA, are established as applicable nationwide. See: “Fact Sheet- EOIR at a Glance,” *Department of Justice*. 9 September 2010. <https://www.justice.gov/eoir/eoir-at-a-glance>.

⁴⁰ Case story originally published in *The Asylum Filing Deadline Denying Protection to the Persecuted and Undermining Governmental Efficiency*, Human Rights First. (September 2010), 31.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ McKenzie, Katherine (M.D.), and Jennifer McQuaid (M.D.) (Yale Center for Asylum Medicine). Personal Interview. 31 October 2017; Zonana, Howard (M.D.) (Yale Immigration Law Clinic and Yale Center for Asylum Medicine). Personal Interview. 31 October 2017. Milewski, Andrew (M.D./PhD Candidate) (Weill Cornell Center for Human Rights). Personal Interview. 2 Nov. 2017.

2003-2008, only two immigration judges (out of an average of 272) were fired by the EOIR.⁴⁵

Other courts have upheld PTSD and trauma-related disorders as an “extraordinary circumstance,” while simultaneously *denying* applicants’ waivers and narrowing the interpretation of when this exception might apply. Immigration Judges often do this by asserting their own lay interpretation of medical documents and diagnoses (similar to the Gambian woman’s case above). For example, in 2010, the 2nd Circuit Court of Appeals accepted that an asylum seeker was suffering from PTSD and that her diagnosis was “related to her failure to timely file” but rejected her waiver and application based on the need for her to demonstrate that her “PTSD prevented her from filing a timely application.”⁴⁶ In another example, the 9th Circuit is currently considering a case in which the asylum seeker, Kateryna Vaskovska, presented her psychiatric diagnosis and an extensive medical affidavit testifying that the her PTSD distinctly relates to gender-based violence.⁴⁷ However, the Immigration Judge and BIA took the liberty to re-interpret the medical records and claimed Vaskovska’s PTSD is *not* a result of the alleged past persecution; they therefore rejected waiving her filing deadline.⁴⁸

Immigration judges and the BIA have indicated little hope for petitioners who claim to be suffering from mental health issues but do not produce medial evidence.⁴⁹ Interestingly, the U.S. asylum system has offered ample examples of relying on the REAL ID Act’s “demeanor” and candor clauses in determining the “untruthfulness” of an applicant’s statements; yet, when the evidence in a case is inconclusive, adjudicators err

⁴⁵ “Turnover Rate for Immigration Judges.” *Transactional Records Access Clearinghouse*, Syracuse University. April 2009. <http://trac.syr.edu/immigration/reports/208/include/turnover.html>.

Average calculated from: “Number of Immigration Judges, 1998 - 2009.” *Transactional Records Access Clearinghouse*, Syracuse University. 2009. <http://trac.syr.edu/immigration/reports/208/include/payroll.html>.

⁴⁶ *Barry v. Holder*, 361 Fed. App’x 268, 269 (2d Cir. 2010). (emphasis my own).

⁴⁷ Malhotra, Anjana (Representing Attorney), “Petitioner’s Corrected Motion for Stay of Removal and Motion to Reconsider this Court’s January 8, 2015 Order,” *Vaskovska v. Holder*, Case No. 14-4382 (9th Circ.). Petition submitted: 28 January, 2015. Available at: https://www.academia.edu/12186243/Second_Motion_for_an_Emergency_Stay_on_Behalf_of_Kateryna_Vaskovska_v._Holder

⁴⁸ *Ibid.* (while psychiatric evaluators strive for objectivity in taking as fact the causal incident for PTSD, in some instances the “type” of traumatic event is inextricable from the diagnosis. This is often the case in gender-related persecution. In Vaskovska’s case, her evaluating doctor did specifically note that Vaskovska’s PTSD was tied to her father’s abuse).

⁴⁹ For instance, in the case of *Goromou v. Holder*, the IJ found that Goromou—a victim of torture—did not qualify for the extraordinary-circumstances exception because “he has not provided documentation of his depression aside from a letter written by Mamady Kaba, a friend of [Goromou], who states that [Goromou] was depressed when he met him, and a report from the Center for Victims of Torture diagnosing [Goromou] with PostTraumatic Stress Disorder (“PTSD”) and Major Depressive Disorder on April 26, 2007. [...] There is no documentation of depression, isolation, or PTSD for the period between [Goromou’s] last entry to the United States and the filing of his asylum application. Therefore, the Court does not find that depression, isolation or PTSD resulted in [Goromou’s] failure to apply for asylum within one year of his entry.” See: *Goromou v. Holder*, Nos. 12–2525, 12–3612 (9th Circuit 2013). <http://caselaw.findlaw.com/us-8th-circuit/1639802.html>

towards rejecting the credibility of an applicant's claim rather simply adjourn to retrieve the necessary documentation.

As Marie Cummins aptly states:

*"The failure to apply the PTSD exception to the one-year deadline thus means that cases involving past persecution will be rejected at a higher rate than cases based solely on the fear of future persecution. This is not the outcome anyone envisioned."*⁵⁰

The American Immigration Lawyers Association assert that the lack of safeguards protecting specific populations of asylum seekers amounts to a violation in due process rights.^{51 52} According to a 2010 study, 20 percent of cases denied by the BIA cited the filing deadline, with nearly half of these denials (46 percent) referencing the filing deadline as the *only* grounds for denial.⁵³ In effect, this bars *bona fide* refugees from seeking relief in the United States,⁵⁴ and violates the 1951 Convention Relating to the Status of Refugees.⁵⁵

4.2.3 Access to adequate counsel

The outcome of a case involving an asylum seeker with PTSD and related disorders can depend not just on the ability to access legal representation, but on the *quality* of that representation. The competence and involvement of the legal counsel determines

⁵⁰ Cummins, 698-699. See *Supra* Note 29.

⁵¹ "Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States," *American Immigration Lawyers Association*, AILA Doc. No. 16061461. (Posted 16 June 16). Available at: <http://www.aila.org/infonet/report-due-process-denied>. ; Also see: Cummins, See *Supra* Note 29. (also purporting that the asylum system violates due process rights for asylum seekers with PTSD).

⁵² "Due process rights afforded by the Fifth Amendment [...] has long been found applicable to noncitizens and citizens alike." (Cited in Cummins, see above footnote). Also see: *Wong Wing v. United States*, 163 U.S. 228, 242 (1896). (stating, "The provisions of the fifth, sixth, and thirteenth amendments of the constitution apply as well to Chinese persons who are aliens as to American citizens. The term 'person,' used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.")

⁵³ "Asylum in the United States." *American Immigration Council*, August 27, 2014. <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

⁵⁴ See: Musalo, Karen, and Marcelle Rice. "Center for Gender & (and) Refugee Studies: The Implementation of the One-Year Bar to Asylum." *Hastings Int'l & Comp. L. Rev.* 31 (2008): 693. (The study looks at dozens of asylum cases in UC Hastings database in which cases were rejected due to filing deadline. Many of these cases exhibited substantial merit and were denied almost *exclusively* due to the filing deadline, even in spite of psychiatric affidavits).

⁵⁵ Article 33(1), provides that: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." See: UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

whether the asylum seeker is referred to a psychiatrist for a forensic evaluation. These evaluations provide asylum seekers with a medical affidavit, which can mitigate unfavorable, misconstrued judgements on the asylum seeker's credibility.

Lawyers and medical professionals alike have highlighted the growing importance of these evaluations in the asylum process.⁵⁶ Meffert *et al.* clarifies that forensic psychiatrists do not assess an asylum seeker's credibility,⁵⁷ but "help the fact finder [the attorney or Immigration Judge] understand that inconsistencies of narrative may be a reflection of trauma rather than lack of credibility."⁵⁸ As traumatic experiences can result in symptoms of avoidance in discussing these memories, the forensic evaluators assist in the "process of excavation, in which factual details are revealed over time."⁵⁹ As traumatic experiences can evoke complex reactions, like disjointed memory, shame, and guilt (e.g. in the case of rape or gender-related persecution), medical professionals' "specific training will often allow her/him to get more complete information than the lawyer does initially."⁶⁰ While this additional information might corroborate part of the diagnosis, it also assists the asylum seeker and her representing attorney in organizing the asylum seeker's narrative ahead of appearing in front of an Immigration Judge.⁶¹

Others have pointed to forensic evaluations as a gateway to treatment for the asylum seeker, which aids the asylum seeker's overall health and ability to collaborate with

⁵⁶ Meffert, Susan M., Karen Musalo, Dale E. McNiel, and Renée L. Binder. "The Role of Mental Health Professionals in Political Asylum Processing." *The Journal of the American Academy of Psychiatry and the Law* 38, no. 4 (2010): 479–89.;

Eidelson, Judy. "Traumatic Memories, Well-Founded Fears, and Credibility," *The PsySR Blog*, January 1, 2010. <http://www.psyr.org/blog/2010/01/01/traumatic-memories-well-founded-fears-and-credibility/>, <http://www.psyr.org/blog/2010/01/01/traumatic-memories-well-founded-fears-and-credibility/>.

"Increasing Reliance on Expert Witnesses in Immigration Cases: A Catch 22?." *The Expert Institute*, February 28, 2017. <https://www.theexpertinstitute.com/increasing-reliance-expert-witnesses-immigration-cases-catch-22/>.

Lee, Katherine. "Seeking Sanctuary." *American Psychological Association*, August 2017. <http://www.apa.org/monitor/2017/07-08/sanctuary.aspx>.

Zonana, Howard. "Commentary: The Role of Forensic Psychiatry in the Asylum Process." *Journal of the American Academy of Psychiatry and the Law Online* 38, no. 4 (December 1, 2010): 499–501; McKenzie, Katherine C., and Arielle Thomas. "Assisting asylum seekers in a time of global forced displacement: Five clinical cases." *Journal of Forensic and Legal Medicine* 49 (2017): 37–41; Gangsei, David and Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 TORTURE 79–87 (2007).

⁵⁷ Thanks to Dr. Jennifer McQuaid for clarifying this point. In cases like PTSD, in which part of the diagnosis is recognizing (and accepting as fact) a causal event, the forensic evaluator will provide a diagnosis when present, and leave descriptions of the causal event unstated (or in the applicant's voice) if the establishing the event is still in question. McKenzie, Katherine (M.D.), and Jennifer McQuaid (M.D.) (Yale Center for Asylum Medicine). Personal Interview. 31 October 2017.

⁵⁸ Meffert, Susan M., Karen Musalo, Dale E. McNiel, and Renée L. Binder. "The Role of Mental Health Professionals in Political Asylum Processing." *The Journal of the American Academy of Psychiatry and the Law* 38, no. 4 (2010): 484.

⁵⁹ *Ibid.*

⁶⁰ Gangsei, David and Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 TORTURE 83(2007).

⁶¹ *Ibid.*

his or her lawyer on the case.⁶²

The effectiveness of psychiatric/forensic evaluations has been proven: they are cited within case decisions,⁶³ and Physicians for Human Rights—which oversees one of the largest networks of forensic evaluators—reports that 89 percent of the cases they evaluate are granted asylum (compared to a national average of 37.5 percent over the same reporting period).⁶⁴ Nearly all asylum seekers who receive a forensic evaluation have legal representation, which poses the question as to whether the success rate can be attributed to a confounding variable. However, the grant rate of those with medical affidavits still surpasses the average grant rate of those with legal counsel.⁶⁵

It is critical to note that “virtually all” asylum seekers who receive medical evaluations have legal representation.⁶⁶ When interviewing clinics, medical professionals stated they strictly took clients when referred to by an attorney or law clinic; if the asylum seeker approached them unrepresented, they would refer him or her to a list of *pro bono* attorneys first.⁶⁷ While the importance of *adequate* legal counsel is discussed below as it determines access to forensic evaluations, it is worth noting that legal counsel *in any capacity* is a pre-existing determinant.

Despite the prevalence of trauma sequelae and the clear need for forensic psychiatrists within the asylum process, legal representatives rely on medical experts less than expected. For example, one study examining some 3,000 asylum claims filed by South Asians found that less than 20 “explicitly mentioned” an expert witness.⁶⁸ Searching through a database of BIA cases, one author found only 200 cases referenced “experts”

⁶² Morgan, CA. “Psychiatric Evaluations of Asylum Seekers.” *Psychiatry (Edmont)* 4, no. 4 (April 2007): 26–33.

⁶³ For example, see *Mukamusoni v. Ashcroft*, 390 F.3d 110 (1st Cir. 2004). Allen Muskamusoni’s case is a landmark decision for including psychiatric evaluations in asylum seekers’ credibility assessment. Allen is a Rwandan national whose family members were killed by Hutus during the genocide. She was then kidnapped and raped by members of the Rwandan Patriotic Front. The Immigration Judge initially ruled that Allen failed to establish the “truthfulness” of her claim and the BIA denied her appeal stating that she was vague when describing her experience of rape. These rulings were *in spite* of a 25-page report provided by a psychologist confirming the applicant’s diagnosis of PTSD, symptoms inhibiting her testimony, as well as statements about her past persecution that were consistent with her original application for asylum. The First Circuit court of appeals remanded the decision, stating that the BIA had failed to consider all information in her case, and the corroborating evidence explaining both her perceived vague testimony, as well as material consistency between her court hearing and medical record.

⁶⁴ Lustig, S. L., Kureshi, S., Delucchi, K. L., Iacopino, V., & Morse, S. C. “Asylum grant rates following medical evaluations of maltreatment among political asylum applicants in the United States.” *Journal of immigrant and minority health*, (2008): 7.

⁶⁵ Lustig, 13. (For example, over the same reporting period, non-detained asylum seekers with representation had a national grant rate of 41 percent).

⁶⁶ Lustig, S. L., Kureshi, S., Delucchi, K. L., Iacopino, V., & Morse, S. C. (2008). Asylum grant rates following medical evaluations of maltreatment among political asylum applicants in the United States. *Journal of immigrant and minority health*, 10(1), 13.

⁶⁷ McKenzie, Katherine (M.D.), and Jennifer McQuaid (M.D.) (Yale Center for Asylum Medicine). Personal Interview. 31 October 2017; Milewski, Andrew (M.D./PhD Candidate) (Weill Cornell Center for Human Rights). Personal Interview. 2 Nov. 2017.

⁶⁸ Holden, Livia, ed. *Cultural expertise and litigation: Patterns, conflicts, narratives*. Routledge, 2011.

(of any kind) out of “tens of thousands of cases.”⁶⁹ This presents a concerning contrast to the rate of trauma-related disorders amongst refugee populations.⁷⁰

There are a number of reasons that prevent legal counsel from referring their clients to medical professionals, including the competence of the attorney involved, cost, and availability of medical professionals to perform evaluations. The decision to refer is, a “clinical assessment in itself” that is wholly determined by a non-clinician.⁷¹

Wilson-Shaw *et al.* examined this issue with lawyers in the UK and found that the likelihood that a legal representative would refer an asylum seeker to a psychiatrist depended on his or her pre-existing knowledge of the use of forensic evaluations, and their “gut” assessment on whether the asylum seeker was exhibiting symptoms of trauma.⁷² The decision to refer is, a “clinical assessment in itself” that is wholly determined by a non-clinician.⁷³ If an immigration or *pro bono* attorney lacked knowledge on case law, training on psychological trauma, or on the use of affidavits in court, they were less likely to consider referring.⁷⁴ Moreover, legal representatives relied on dramatic and conventional signs of trauma— such as flashbacks and reference to nightmares— to determine that the asylum seeker was eligible for referral.⁷⁵ This crucially ignored symptoms such as avoidance, and required the asylum seeker to exhibit or speak about his or her symptoms in the limited time frame when interacting with the legal representative.⁷⁶ Lawyers also dismissed other disorders⁷⁷— such as depression and anxiety— though these illnesses have been linked to memory impairment, and lack of coherency.⁷⁸

⁶⁹ “Increasing Reliance on Expert Witnesses in Immigration Cases: A Catch 22?” *The Expert Institute*, February 28, 2017. <https://www.theexpertinstitute.com/increasing-reliance-expert-witnesses-immigration-cases-catch-22/>.

⁷⁰ Lee, Katherine. “Seeking Sanctuary.” *American Psychological Association*, August 2017. <http://www.apa.org/monitor/2017/07-08/sanctuary.aspx>.

⁷¹ Wilson-Shaw, Lucy, Nancy Pistrang, and Jane Herlihy. “Non-Clinicians’ Judgments about Asylum Seekers’ Mental Health: How Do Legal Representatives of Asylum Seekers Decide When to Request Medico-Legal Reports?” *European Journal of Psychotraumatology*, 3. (October 16, 2012).

⁷² Wilson-Shaw, Lucy, Nancy Pistrang, and Jane Herlihy. “Non-Clinicians’ Judgments about Asylum Seekers’ Mental Health: How Do Legal Representatives of Asylum Seekers Decide When to Request Medico-Legal Reports?” *European Journal of Psychotraumatology*, 4, 7. (October 16, 2012). <https://doi.org/10.3402/ejpt.v3i0.18406>.

⁷³ Wilson-Shaw, *et al.*, 3.

⁷⁴ *Ibid.*, 4.

⁷⁵ *Ibid.*, 7.

⁷⁶ *Ibid.*, 7.

⁷⁷ For example, “Depression was generally perceived as not being grave enough by itself to warrant referring for a report, as it was thought that courts would not give any weight to depression alone.” See: Wilson-Shaw, Lucy, Nancy Pistrang, and Jane Herlihy. “Non-Clinicians’ Judgments about Asylum Seekers’ Mental Health: How Do Legal Representatives of Asylum Seekers Decide When to Request Medico-Legal Reports?” *European Journal of Psychotraumatology*, 4, 7. (October 16, 2012). <https://doi.org/10.3402/ejpt.v3i0.18406>.

⁷⁸ Burt, Diana Byrd, Mary Jo Zembar, and George Niederehe. “Depression and memory impairment: a meta-analysis of the association, its pattern, and specificity.” *Psychological bulletin* 117.2 (1995): 285. (discussing depression’s “stable association” with memory impairment); Robinson, Oliver J., et al. “The impact

Pro bono forensic evaluations are a limited resource. Lack of trained medical professionals and low-cost evaluations presents a tremendous barrier as well.⁷⁹ This was a recurrent theme throughout all interviews with both medical and legal professionals.⁸⁰ Between June and October 2017, Physicians for Human Rights— which outsources evaluation requests to trained medical professionals throughout the country— was too overburdened to take in new requests.⁸¹ For legal professionals who cannot secure *pro bono* medical reports for their clients, the asylum seeker is expected to pay between \$650 and \$1,000 for a psych evaluation.⁸²

A study conducted in the Midwest revealed that legal professionals recognize that the “vast majority” of their asylum clients would benefit from a psychiatric evaluation, but only refer a handful of clients when there is a very clear chance of success for that case.⁸³ Since many of the forensic evaluators the lawyers relied on were personal contacts, the lawyers expressed reluctance to exploit their professional network.⁸⁴ Instead, they cherry picked.

4.2.4 Re-traumatization and access to treatment

Irrespective of whether a traumatized asylum seeker is represented, the inherently adversarial nature of immigration hearings renders a particularly challenging environment for her success.⁸⁵ Both legal and medical professionals have expressed concerns

of anxiety upon cognition: perspectives from human threat of shock studies.” *Frontiers in Human Neuroscience* 7 (2013). (discussing how anxiety disorders affect levels of cognition, memory, and certain aspects of executive functioning).

⁷⁹ “The study results suggest substantial unmet need for trained physicians to perform medical and psychological evaluations on a pro bono basis.” See: Scruggs, Elizabeth, Timothy C. Guetterman, Anna C. Meyer, Jamie VanArtsdalen, and Michele Heisler. “‘An Absolutely Necessary Piece’: A Qualitative Study of Legal Perspectives on Medical Affidavits in the Asylum Process.” *Journal of Forensic and Legal Medicine* 44, no. Supplement C (November 1, 2016): 72. <https://doi.org/10.1016/j.jflm.2016.09.002>.

⁸⁰ Elcheikh, Maya (Attorney), and Jessica Gorelick (Social Worker) (Human Rights First). Personal Interview. 3 Nov. 2017; McKenzie, Katherine (M.D.), and Jennifer McQuaid (M.D.) (Yale Center for Asylum Medicine). Personal Interview. 31 October 2017; Zonana, Howard (M.D.) (Yale Immigration Law Clinic and Yale Center for Asylum Medicine). Personal Interview. 31 October 2017. Milewski, Andrew (M.D./PhD Candidate) (Weill Cornell Center for Human Rights). Personal Interview. 2 Nov. 2017.

⁸¹ “Physicians for Human Rights: ‘How We Can Help You’ to Attorneys.” *Physicians for Human Rights*. Accessed October 4, 2017. <http://web.archive.org/web/20170927153742/http://physiciansforhumanrights.org/asylum/for-attorneys.html>

⁸² Musalo, Karen, and Marcelle Rice. “Center for Gender & (and) Refugee Studies: The Implementation of the One-Year Bar to Asylum.” *Hastings Int’l & Comp. L. Rev.* 31 (2008): 693; Also see: “Immigration Basics: The One-Year Filing Deadline.” *Immigration Equality*. 2015. <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-basics-the-one-year-filing-deadline/>.

⁸³ Scruggs, Elizabeth, Timothy C. Guetterman, Anna C. Meyer, Jamie VanArtsdalen, and Michele Heisler. “‘An Absolutely Necessary Piece’: A Qualitative Study of Legal Perspectives on Medical Affidavits in the Asylum Process.” *Journal of Forensic and Legal Medicine* 44, no. Supplement C (November 1, 2016): 74. <https://doi.org/10.1016/j.jflm.2016.09.002>.

⁸⁴ *Ibid.*

⁸⁵ Note that asylum hearings are inherently adversarial. As Nogales explains, “In both affirmative cases that were referred by an asylum officer and in defensive cases, immigration court hearings are adversarial

over adjudicators who willfully adopt a more oppositional approach during an interview as it can deter a traumatized asylum seeker from providing a “complete story.”⁸⁶ It can also hinder the asylum seeker’s level of coherency during an interview.⁸⁷ For instance, in the case of a torture survivor (a population with the highest rate of PTSD), the asylum seeker might be primed to associate the conditions of the immigration hearing in which he is “forced to talk” about his difficult past with his experience of torture (which oftentimes occurs under the pretext that the persecutor demands that the asylum seeker “talk.”)⁸⁸ Some legal scholars have hypothesized that sensitivity levels in hearings are a contributing factor to the disparity rates amongst immigration judges.⁸⁹

Medical professionals have highlighted the therapeutic aspect of forensic evaluations. While mental health professionals remain objective throughout the evaluation, the process of telling one’s story in a non-adversarial environment with a professional who is trained on sensitive interview techniques results in a sense of agency and even recovery.⁹⁰ Yet without this preparation, the asylum process (as it is limited to interactions with the state) can have dire consequences on an applicant’s health, and result in re-traumatization.⁹¹

While asylum officers are trained on trauma sequelae, legal advocates fear that the scant time devoted to training officers can affect their ability to be adequately sensitive in practice.⁹² Moreover, research reveals that these trainings take place less often than stated, and are not streamlined across offices.⁹³ This weak foundation is further strained

proceedings. A DHS attorney is assigned to cross-examine the asylum applicant and usually argues before the immigration judge that asylum is not warranted.” See: Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 309.

⁸⁶ Ramji-Nogales, Jaya et al., see *Supra* note 40.

⁸⁷ *Ibid.*

⁸⁸ Gangsei, David and Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 TORTURE 79, 80, 82 (2007).

⁸⁹ Ramji-Nogales, Jaya et al., see *supra* note 40 at 343. (referring to a difference of 16.5% in asylum case outcomes between male and female judges, the authors posit that this is partially due to the different documented approaches of interviewing asylum seekers using a trauma-sensitive approach).

⁹⁰ Gangsei, David and Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 TORTURE (2007).

⁹¹ Schock, Katrin, Rita Rosner, and Christine Knaevelsrud. “Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers.” *European Journal of Psychotraumatology* 6 (September 1, 2015). <https://doi.org/10.3402/ejpt.v6.26286>. (“analyses revealed perceived justice of the interview to predict the increase of intrusions and the number of experienced traumata and testimony stress to predict posttraumatic avoidance.”).

⁹² Ardalan, Sabrineh. “Access to justice for asylum seekers: Developing an effective model of holistic asylum representation.” *U. Mich. JL Reform* 48 (2014): 1012.

See training materials here: See U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, INTERVIEWING PART IV: INTER-CULTURAL COMMUNICATION AND OTHER FACTORS THAT MAY IMPEDE COMMUNICATION AT AN ASYLUM INTERVIEW (2002), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/Interview-Part4-Intercultural-Communication-31aug10.pdf>

⁹³ E.g. ““We have had no training conferences in person for the last three years. . . . We used to have [a] training conference every year but because of funding cuts we have not.” Ludden, Jennifer “Complaints

when an IJ is pressured to focus on numbers rather than quality of decision.⁹⁴

Access to treatment is negligible, making it difficult for an applicant to recover from previous disturbing experiences and added stressors from the asylum process. The federal government does not extend subsidized public health insurance programs (e.g. Medicaid) to asylum seekers whose claims are still pending, (though a few states have created their own measures).⁹⁵ This makes it especially difficult for many asylum seekers to seek treatment early on, given the 150-day bar from employment upon entry into the country.⁹⁶

4.3 Case study

Lyubov Slyusar, a Ukrainian citizen, served as a social worker at a non-governmental organization assisting the elderly in Shepetovka, Ukraine in the early 2000's. At the organization, Slyusar was tasked with researching and writing a report on potential fraud within her office. She discovered a "significant amount" of "unlawful non-cash pensions being distributed by her office" that implicated a number of government officials.⁹⁷ Slyusar named the government officials in her report, provided it to her supervisor, and was informed that nothing would be done of the report. Outraged, Slyusar provided her report to a local radio station, which aired the contents of the report shortly thereafter. Within a month, Sylusar received threatening calls, was abducted on her way home from work by police officers, and detained in a police station for a week. While incarcerated, Sylusar was tortured (beaten, forced to ingest liquid that pained her, smothered with pepper powder), and gang raped. She was abducted by police officers again a year later, presented with her report, and beaten until she regained consciousness in a hospital.

Prompt Government Review of Immigration Courts," *NPR: Morning Edition, National Public Radio broadcast* (Feb. 9, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5198044>. Also see: Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 381. (predicting that lack of standardization around training, and a non-comprehensive training program, have led to disparities in asylum outcomes across asylum offices and amongst asylum officers).

⁹⁴ For example, in 2011, Immigration Judges typically managed 69 cases per week, and were asked to complete decisions for 27 cases per week. See: Miller, Banks, Linda Camp Keith, and Jennifer S. Holmes. *Immigration judges and US asylum policy*. "Chapter 1: Introduction," University of Pennsylvania Press, 2014. Also see: "Tilted Justice: Backlogs Grow While Fairness Shrinks in U.S. Immigration Courts," Human Rights First, October 2017: (16-17). (Describing growing pressure from the Trump Administration to "expedite cases" at the cost of careful decision making).

⁹⁵ Llano, Rayden, "Immigrants and Barriers to Healthcare: Comparing Policies in the United States and the United Kingdom," *Stanford Journal of Public Health* (June 2011).

⁹⁶ "Learn About the Asylum Application Process." USCIS. Last updated 12 May 2017. <https://www.uscis.gov/humanitarian/refugees-asylum/asylum>.

⁹⁷ *Slyusar v. Holder*, No. 13-3071 (6th Cir. 2014): 2. Available at <http://www.opn.ca6.uscourts.gov/opinions.pdf/14a0021p-06.pdf>.

When Sylusar arrived in the United States in 2003, she sought legal counsel to help her file for asylum. Her attorney told Sylusar that he would file a petition on her behalf, though no petition was filed. In 2005, Sylusar filed directly for asylum after USCIS denied her application for lawful permanent residency and placed her in removal proceedings.

An Immigration Judge heard Sylusar's case in 2011, and rejected her claim based on negative credibility and missing the filing deadline.

On appeal, the BIA upheld the IJ's decision, "declining to disturb the adverse credibility determination of the IJ."⁹⁸ The 6th Circuit Court of Appeals reviewed the decision in 2016 and, with seeming reluctance, affirmed the BIA's decision. The Court's verdict was based on their task to "review the IJ's credibility determination under the deferential 'substantial evidence' standard," and therefore found "Slyusar has not presented evidence that would compel a reasonable adjudicator to disagree with the IJ's finding."⁹⁹ Ironically, the IJ and BIA had barred Slyusar from submitting additional evidence.

The Circuit Court addresses its concern over an expanding discretionary power afforded to immigration judges to reject traumatized applicants under the guise of adverse credibility. Judges Keith, Guy, and Gibbons write in their concluding remarks:

"... We wish to make the following cautionary note: We respect Congress's calculated decision to imbue upon an IJ a significant amount of deference with regards to adverse credibility determinations. However, we wish to emphasize that '[a]lthough the REAL ID Act expands the bases on which an IJ may rest an adverse credibility determination, it does not give a blank check to the IJ enabling him or her to insulate an adverse credibility determination from our review of the reasonableness of that determination.' Ren, 648 F.3d at 1084 (quotation omitted). As the Ren Court recognized, 'victims of abuse often confuse the details of particular incidents, including the time or dates of particular assaults and which specific actions occurred on which specific occasion; thus, the ability to recall precise dates of events years after they happen is an extremely poor test of how truthful a witness's substantive account is.' Id. at 1085-86 (internal citations and quotation marks omitted).

We are concerned that the provisions of the Act may have the effect of punishing applicants for their trauma. [...] We are further concerned by the precedent that, even if an omission or inaccuracy is categorized as de minimis, it may

⁹⁸ Sylusar v. Holder, No. 13-3071 (6th Cir. 2014): 5. Available at: <http://www.opn.ca6.uscourts.gov/opinions.pdf/14a0021p-06.pdf>

⁹⁹ Sylusar v. Holder, No. 13-3071 (6th Cir. 2014): 5. Available at: <http://www.opn.ca6.uscourts.gov/opinions.pdf/14a0021p-06.pdf>

still support an IJ's adverse credibility finding. [...] Although the credibility determination no longer includes a requirement that the inconsistency be material to the asylee's claim, we urge courts to remember that any inconsistencies or inaccuracies must always be considered in light of the 'totality of the circumstances.' 8 U.S.C. §1158(b)(1)(B)(iii). ***With this in mind, we observe that credibility determinations can often be based on external factors not indicative of veracity.*** [...] Here, this Court rules as it does because it is bound by the decision of the Board, in the absence of evidence that would compel a reasonable adjudicator to conclude contrarily."¹⁰⁰

The Circuit Court judges struggle with the compounding issues embedded in U.S. asylum law that work against traumatized asylum seekers, namely: inadequate counsel; the REAL ID Act's permission to dismiss on peripheral grounds; and deference to immigration judges on "findings of fact", including an applicant's credibility. In *Slyusar v. Holder*, the circuit judges record their hesitancy to affirm a negative credibility finding, considering that the Immigration Judge might have "committed reversible error by failing to allow her to submit evidence in support of [an aspect of] her claim,"¹⁰¹ and concedes "another IJ might have ruled differently."¹⁰² Yet the BIA and Appeals Courts are bound to affirm the IJ's credibility determination unless it meets the high threshold of "clearly erroneous."¹⁰³ In *Slyusar's* case, the deference doctrine precluded the BIA from accepting additional evidence that *Slyusar* attempted to submit in her defense at the appeals stage.¹⁰⁴

It is curious that the greatest— and often only— weight given to credibility determinations is at a stage in which there is pressure to make remarkably hurried decisions. Immigration judges have expressed that credibility determinations are "extremely, extremely difficult," yet they are asked to take on over six dozen cases a week and decide on some three dozen.¹⁰⁵ To put this into perspective, consider the following:

"[W]hile the average Federal district judge has a pending caseload of 400 cases and three law clerks to assist, in Fiscal Year ("FY") 2009, immigration judges completed

¹⁰⁰ *Slyusar v. Holder*, No. 13-3071 (6th Cir. 2014): "Conclusion". Available at: <http://www.opn.ca6.uscourts.gov/opinions.pdf/14a0021p-06.pdf> (bolded emphasis my own).

¹⁰¹ *Slyusar v. Holder*, No. 13-3071 (6th Cir. 2014): 7. Available at: <http://www.opn.ca6.uscourts.gov/opinions.pdf/14a0021p-06.pdf>

¹⁰² *Ibid.*

¹⁰³ 8 C.F.R. 5 §1003.1(d)(3)(i).

¹⁰⁴ *Slyusar v. Holder*, No. 13-3071 (6th Cir. 2014): 7. Available at <http://www.opn.ca6.uscourts.gov/opinions.pdf/14a0021p-06.pdf>.

¹⁰⁵ Miller, Banks, Linda Camp Keith, and Jennifer S. Holmes. *Immigration judges and US asylum policy*. "Chapter 1: Introduction," University of Pennsylvania Press, 2014.

over 1500 cases per judge on average, with a ratio of one law clerk for every four judges.¹⁰⁶

As of October 2017, there are now 1,900 cases per Immigration Judge.¹⁰⁷

Since many asylum officers and immigration judges predominantly issue oral decisions,¹⁰⁸ the rulings are, in effect, “extemporaneous [...] with little or no time to reflect or to deliberate” and “not enough time to do research...”¹⁰⁹ In practice, this legal precedent at the first stage (before appealing to the BIA) is optional.

It is worth pausing to appreciate the dissonance between this messy environment of fast-paced, verbal decisions, and the bold, traction-able decision that a judge makes on the nature of “truth.”

The United Nations advises its lawyers to view refugee adjudication as “declaratory”, rather than a process of *conferring* status. In effect, the United Nations argues that a refugee “does not become a refugee because of recognition, but is recognized because he is a refugee.”¹¹⁰ While this language is subtle, it reinforces the idea that asylum seekers hold the truth, and immigration lawyers act as fact-finders’ seeking to uncover this truth. Fact finding might become more difficult when an asylum seeker’s story is somewhat obscured by signs of trauma, but there is still a shared burden of proof between the applicant and the adjudicator in the process of excavation.

There is no similar language like this in U.S. law. Given the level of discretion permitted within the REAL ID Act’s credibility indicators, it would be reasonable to see how a judge’s own understanding of what is plausible or true might be (erroneously) projected upon an asylum seeker who comes from very different circumstances. When judges are overwhelmed and making “extemporaneous” decisions, these vague credibility clauses would understandably become a crutch for snap judgements.

¹⁰⁶ Marks, Dana. “Written Statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges, Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office For Immigration Review,” June 17, 2010, http://judiciary.house.gov/_files/hearings/pdf/Marks100617.pdf.

¹⁰⁷ “DOJ Tackles Immigration Court Backlogs.” *Center for Immigration Studies* (CIS.org). 9 November 2017. <https://cis.org/Arthur/DOJ-Tackles-Immigration-Court-Backlogs>.

¹⁰⁸ Miller, et. al. *Supra* Note 20; Also see: Canada: Immigration and Refugee Board of Canada, *United States: Whether immigration judges issue written reasons for decisions made in asylum claims; if this is the case, requirements and procedures for the claimant to request the written reasons, including if the claimant is outside the country*, 21 July 2014, USA104912.E, available at: <http://www.refworld.org/docid/56f397654.html>.

¹⁰⁹ Miller, et. al. *Supra* Note 20;

¹¹⁰ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, p. 9, available at: <http://www.refworld.org/docid/4f33c8d92.html>

4.4 Conclusion

Asylum seekers experiencing trauma-related disorders must overcome obstacles at every stage in the U.S. asylum process: in accessing counsel; in accessing *adequate* counsel that will refer them to medical professionals; in facing a legal system whose arbitrary credibility standards and review process specifically disadvantages traumatized asylum seekers; and in navigating a system that can aggravate their disorders with limited options for treatment.

Legal counsel may screen out traumatized asylum seekers from their clientele pool for the same ambiguous hunches that immigration judges use to deem an applicant “untruthful.” Considering the wide spread in quality of lawyers, asylum seekers may very well end up with counsel that is ill-trained on trauma-related disorders and therefore not know when is appropriate to request a forensic evaluation. Even if an asylum seeker’s lawyer is sensitized to mental health issues, and knowledgeable about the usefulness of medical affidavits in the process, there is still a severe shortage of medical professionals able to provide forensic evaluations.

Procedural standards within this legal regime infringe on traumatized asylum seekers’ due process rights. In particular, a lack of procedural safeguards on the one-year filing deadline bars traumatized asylum seekers from having their claims evaluated on their merits. As proven in a number of cases, this has prevented *bona fide* refugees from protection.

The REAL ID Act permits judges to determine an asylum seeker’s credibility based on “demeanor” and other arbitrary indicators, disadvantaging applicants whose trauma symptoms mimic indicators that judges associate with dishonesty. Even with the testimony of mental health professionals, a robust case may still be rejected depending on the Immigration Judge’s attitude towards mental health disorders.¹¹¹

The deference doctrine of regarding immigration judges’ “findings of fact” as nearly untouchable except in incredulous circumstances, places tremendous power in the hands of the most over-burdened and subjective actors within the asylum process. The deference doctrine ties the hands of higher courts from conducting a full and thorough review, especially given that a credibility determination essentially rejects or takes as valid the entire evidence of an asylum case.

Finally, an asylum seeker has limited options for affordable mental health care throughout a process that is unpredictable and adversarial.

¹¹¹*Zeru v. Gonzales*, 503 F.3d 59 (1st Cir. 2007); Also see: Anjana Malhotra (Attorney), “Petitioner’s Corrected Motion for Stay of Removal and Motion to Reconsider this Court’s January 8, 2015 Order,” *Vaskovska v. Holder*, Case No. 14-4382 (9th Circ.). Petition submitted: 28 January, 2015. Available at: https://www.academia.edu/12186243/Second_Motion_for_an_Emergency_Stay_on_Behalf_of_Kateryna_Vaskovska_v._Holder (discussed earlier).

Researchers and scholars have examined each of these components as they affect traumatized asylum seekers. However, there has yet to be a literature focusing on the compilation of these factors, highlighting the totality of obstacles as they uniquely affect this population. Looking at the obstacles in sequence, it is reasonable to theorize that these issues are dynamically interrelated, and compound on one another. For instance, an asylum seeker with PTSD might be disinclined to talk about her trauma within the first year of her arrival; in seeking an attorney to help her waive the deadline, she might be at higher risk of being screened out if she still has difficulty presenting her story “coherently”; lack of attorney affects her access to medical professionals and recovery, and disadvantages her case in court; she has a difficult time appealing this decision, given the deference doctrine.

My study does not indicate that these features are causal. There is a lack of data—and access to data—on this population given that to identify the full scope of this group would require diagnoses, which were likely not afforded to the most vulnerable. However, this paper does indicate a strong need for further research to determine the relationship between each of these issues, and case outcomes.

Chapter 5

Most Affected Populations: Detained Asylum Seekers

Detention centers in the United States present incarcerated asylum seekers with tremendous structural barriers to justice. The previous chapter argues that the current legal regime violates due process rights of traumatized asylum seekers, first, by hindering access to legal counsel and court hearing dates; and second, in applying arbitrary standards in court. This chapter highlights how detained asylum seekers face unconscionable obstacles in way of the first point. Moreover, the immigration detention system threatens the psychological well-being of a population who is already facing challenges to their mental health and recovery.

5.1 Background

The immigration detention system in the United States is opaque. Each detention facility is bound by constitutional law, and a set of administrative standards which varies based on the “terms of contracts” signed between the detention facility and ICE.¹ ICE does not make inspection reports publicly available, and advocacy groups who file Freedom of Information Act requests face pushback, and are provided with outdated documents with ill-defined methodologies.²

¹ “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p. 6).

² “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.9); Also see: “United States Immigration Detention Profile | Global Detention Project | Mapping Immigration Detention around the World.” *Global Detention Project* (blog), n.d. <https://www.globaldetentionproject.org/countries/americas/united-states>. (The Global DetentionProject has filed multiple Freedom of Information Act requests and repeatedly found that “ICE officials failed to ... [provide] statistics about asylum seekers in detention.”); “Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers.” *Human Rights First*. 26 August 2016. <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>. (p.

In 2014, new guidelines re-prioritized “detering” asylum applicants from crossing into the United States by detaining families, and expediting cases with families and unaccompanied minor applicants.³ By the end of 2014, the number of detained asylum seekers tripled over a four-year period.⁴ A number of advocacy groups warned that this cut short the time needed to secure legal counsel for vulnerable cases, while increasing the wait time for all other immigration cases.⁵ Moreover, the leading non-profit network of pro bono asylum attorneys in the Midwest explained that this two-track system has further hindered newly arrived (and oft-detained) asylum seekers from finding attorneys willing to represent their case.⁶ Since *pro bono* attorneys have cases pending four to five years out, they are becoming increasingly hesitant to take on additional cases.⁷

In the wake of the Department of Homeland Security’s announcement to end private management of federal prisons, the government signed contracts with the same corporations to run detention facilities; in 2016, DHS added 10,000 beds to the system.⁸ Consequently, “some of the worst private prisons in the nation, could simply become immigration detention centers.”⁹

Moreover, the Trump-era has ushered in renewed and intense focus on detention. Arrests and detention of immigrants increased by 37 percent in Trump’s first 100 days

11) (“ICE does not complete the reports in a timely manner. At the time of this writing, ICE had not completed the FY 2015 report, more than nine months after the close of the fiscal year. ICE has also failed to provide the FY 2011 report to Congress. The annual reports are also typically difficult for the public to extricate from ICE even through the filing of a FOIA request.¹² Moreover, some of the information presented is not well- defined and the methodologies for collecting and reporting information appear to vary from year to year, making it difficult to make year-over-year comparisons.”)

³ “The Impact of President Trump’s Executive Orders on Asylum Seekers,” *Harvard Law School Harvard Immigration and Refugee Clinical Program*, 8 February 2017, available at: <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf> (p. 1, 9).

⁴ “Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers.” *Human Rights First*. 26 August 2016. <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>.

⁵ “The Impact of President Trump’s Executive Orders on Asylum Seekers,” *Harvard Law School Harvard Immigration and Refugee Clinical Program*, 8 February 2017, available at: <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf> (p. 9); Newman, John. “Finding a Lawyer a Huge Obstacle for Asylum Seekers in Chicago.” *Chicago Reporter*. 20 May 2015. <http://chicagoreporter.com/finding-a-lawyer-a-huge-obstacle-for-asylum-seekers-in-chicago/>.

⁶ Newman, John. “Finding a Lawyer a Huge Obstacle for Asylum Seekers in Chicago.” *Chicago Reporter*. 20 May 2015. <http://chicagoreporter.com/finding-a-lawyer-a-huge-obstacle-for-asylum-seekers-in-chicago/>.

⁷ Newman, John. “Finding a Lawyer a Huge Obstacle for Asylum Seekers in Chicago.” *Chicago Reporter*. 20 May 2015. <http://chicagoreporter.com/finding-a-lawyer-a-huge-obstacle-for-asylum-seekers-in-chicago/>.

⁸ “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.6)

⁹ *Ibid.*

in office. (The “overwhelming majority” of removal cases since May 2016 did not involve criminal violations.)¹⁰ Simultaneously, the Department of Homeland Security has expedited cases by moving immigration judges from across the country to detention centers where they are given heavy caseloads with pressure for quick turn-around.¹¹ The timeline for adjudicating these cases is seemingly arbitrary, making it even more difficult for asylum seekers to plan accordingly and access counsel. For instance, recent records indicate asylum seekers remain in detention for several years,¹² while attorneys report being contacted by clients whose cases are within 30-45 days.¹³

5.2 Access to counsel

Detained asylum seekers are five times less likely to secure legal counsel compared to their non-detained counterparts.¹⁴ This is relatively unsurprising given the barriers posed at every step.

¹⁰ “Immigration Court Backlog Nears 600,000,” *Transactional Records Access Clearinghouse*, Syracuse University. 16 June 2017. <http://trac.syr.edu/whatsnew/email.170616.html>.

¹¹ Laughland, Oliver. “Inside Trump’s Secretive Immigration Court: Far from Scrutiny and Legal Aid.” *The Guardian*, June 7, 2017, sec. US news. <http://www.theguardian.com/us-news/2017/jun/07/donald-trump-immigration-court-deportation-lasalle>; Acer, Eleanor. “Sessions Presses Bogus Asylum Narrative at the Immigration Courts.” *Human Rights First*. 12 October 2017. <https://www.humanrightsfirst.org/blog/sessions-presses-bogus-asylum-narrative-immigration-courts>; “NIJC Condemns the Department of Justice’s Latest Effort to Co-Opt the Immigration Court System for Political Ends.” *National Immigrant Justice Center*. 13 October 2017. <https://www.immigrantjustice.org/press-releases/nijc-condemns-department-justices-latest-effort-co-opt-immigration-court-system>; Spagat, Elliot. “Immigration Judges to Be Sent to Border Detention Centers.” *KQED News* (blog), March 17, 2017. <https://www.kqed.org/news/2017/03/17/immigration-judges-to-be-sent-to-border-detention-centers/>.

¹² Human rights groups have recorded asylum seekers being held in detention for two to three and a half years. See: “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.4); “Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers.” *Human Rights First*. 26 August 2016. <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>. (p. 4).

¹³ Kim, Kyle. “Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid before Being Deported.” *Los Angeles Times*, 28 September 2017. <http://www.latimes.com/projects/la-na-access-to-counsel-deportation/>; Laughland, Oliver. “Inside Trump’s Secretive Immigration Court: Far from Scrutiny and Legal Aid.” *The Guardian*, June 7, 2017, sec. US news. <http://www.theguardian.com/us-news/2017/jun/07/donald-trump-immigration-court-deportation-lasalle>.

¹⁴ “Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers.” *Human Rights First*. 26 August 2016. <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>. (p. 4). Also see: Eagly & Shafer, 32 (only 14 percent of detained immigrants receive legal counsel); Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.11, 21)

First, detained asylum seekers are increasingly likely to remain in detention for longer periods. If a detained asylum seeker expresses a fear of persecution upon return to his/her country of origin, ICE refers the asylum seeker to an officer from UCSIS who then conducts a “credible fear” screening. If the asylum officer finds the asylum seeker demonstrates a “significant possibility” of presenting a successful claim in front of an Immigration Judge, ICE is directed to release the asylum seeker on bond or parole until his or her immigration hearing.¹⁵ There are clear benefits of releasing asylum seekers from detention (69 percent find legal counsel; released immigrants are more likely to appear in court; less cost on detention facilities).¹⁶ Yet ICE has recently employed a “blanket rejection” of such cases.¹⁷ In 2015, less than half of detained asylum seekers eligible for parole were released (compared to 80 percent in 2012).¹⁸ The Southern Poverty Law Center looked at detention facilities in several southern states and found that “virtually no one” was released from private detention facilities;¹⁹ and a lawyer from San Diego, CA pointed out that ICE is “almost categorically” bypassing the step of considering immigrants for release and “punting people” to Immigration Court.²⁰

For the few detained asylum seekers who are able to receive legal counsel, this climate shift has compromised the quality and dedication of legal counsel. For instance, a lawyer from Texas commented that immigrant and pro bono attorneys, while previously focused on asylum cases, are “now all bond-focused” and exhaust a significant amount of their efforts just ensuring their clients’ release.²¹ And the fight is nearly futile. When an ICE officer or Immigration Judge grants release on bond, they have trended towards setting unreasonable price tags— especially given the pre-existing gap on this

¹⁵ “Questions & Answers: Credible Fear Screening.” *USCIS*. Last updated 15 July 2015. <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening>.

¹⁶ Eagly, Ingrid V., and Steven Shafer. “A National Study of Access to Counsel in Immigration Court.” *U. Pa. L. Rev.* 164 (2015): 2, 32.

¹⁷ Hoffman, Meredith. “Trump Era Ushers in New Unofficial Policy on Asylum-Seekers.” *Rolling Stone*. 4 April 2017. <http://www.rollingstone.com/politics/features/trump-era-ushers-in-new-unofficial-policy-on-asylum-seekers-w473930>

¹⁸ Morrissey, Katie. “Even before Trump, Asylum Seeker Already Caught up in Clogged System.” *San Diego Union-Tribune*, January 20, 2017. <http://www.sandiegouniontribune.com/news/immigration/sd-me-asylum-detention-20170120-story.html>. (this is part of an overall trend to detain and retain immigrants. For instance In 2015, only 5.8 percent of detainees received parole, despite the number of people “who fit the profile for parole.” See: SPLC 11).

¹⁹ “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (11)

²⁰ Hoffman, Meredith. “Trump Era Ushers in New Unofficial Policy on Asylum-Seekers.” *Rolling Stone*. 4 April 2017. <http://www.rollingstone.com/politics/features/trump-era-ushers-in-new-unofficial-policy-on-asylum-seekers-w473930>.

²¹ Hoffman, Meredith. “Trump Era Ushers in New Unofficial Policy on Asylum-Seekers.” *Rolling Stone*. 4 April 2017. <http://www.rollingstone.com/politics/features/trump-era-ushers-in-new-unofficial-policy-on-asylum-seekers-w473930>.

population's access to financial resources.²² In 2015, bond for detained immigrants averaged \$8,200 nationally,²³ with higher bond rates in locations with heavily populated detention facilities.²⁴

The government is obliged to provide detained immigrants with a list of resources describing the removal proceeding process, as well as a list of nearby legal services (some of which might be *pro bono*). Yet multiple sources report that these resources are often difficult to physically access, as well as out-of-date.²⁵ For instance, in their examination of six heavily impacted detention facilities, the Southern Poverty Law Center found that the detention operators regularly limited library hours; spontaneously cancelled the allotted library hours for the week; limited the number of photocopies an immigrant could make (required for filing an application); had faulty and erratic mail delivery systems; and altogether skipped "legal orientation", which provides a general overview of immigrants' rights.²⁶ Others have made similar critiques throughout the country.²⁷

Most detained asylum seekers are held in rural and remote areas, exceedingly far from metropolitan areas where legal services are located. According to *Los Angeles Times*, 30 percent of detained immigrants "are held in facilities more than 100 miles from the nearest government-listed legal aid resource," with a median distance of 56

²² For instance, Eagely and Shafer simply summarized: "many immigrants are not able to afford the high bonds." See: Eagely and Shafer 69, footnote 220.

²³ "Shadow Prison Immigrant Detention in the South," *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.11)

²⁴ For instance, ACLU found that the median bond rate in Central California was \$10,000, while the SPLC found bond rates approaching \$12,000 and \$14,000 in southern states. See: See ACLU, RESTORING DUE PROCESS: HOW BOND HEARINGS UNDER *RODRIGUEZ V. ROBBINS* HAVE HELPED END ARBITRARY IMMIGRATION DETENTION 4 fig.4a (Dec. 2014), <https://www.aclu.org/sites/default/files/assets/restoringdueprocess-aclusocal.pdf>; "Shadow Prison Immigrant Detention in the South," *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p. 11)

²⁵ "Shadow Prison Immigrant Detention in the South," *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf; LA Times.

²⁶ "Shadow Prison Immigrant Detention in the South," *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p. 6, 10, 39).

²⁷ For instance, *The Los Angeles Times* interviewed attorneys working in detention centers in the greater LA area and noted that the government's "essential tool"— or its list of legal counsel resources— are out-of-date, and not posted in public places in the detention facilities; moreover, non-profits on the list are not necessarily required to provide free counsel. See: Kim, Kyle. "Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid before Being Deported." *Los Angeles Times*, 28 September 2017. <http://www.latimes.com/projects/la-na-access-to-counsel-deportation/>; Others in the Midwest have anecdotally reported on ICE repeatedly moving immigrants to multiple detention centers as a strategy to encourage voluntary deportation. See: Canon, Dan. "A System Designed to Make People Disappear." *Slate*, April 2, 2017. http://www.slate.com/articles/news_and_politics/cover_story/2017/04/ice_detainees_enter_an_unbelievably_cruel_system_designed_to_make_them_disappear.html.

miles.²⁸

5.3 Conditions

Asylum seekers are detained in “prison-like” conditions.²⁹ In a survey conducted by the U.S. Commission on International and Religious Freedom, the majority of detention facilities mimicked penal (rather than civil) institutions, and color-coded immigrants’ jumpsuits based on “risk level.”³⁰ An investigation on detention facilities in the South found that detainees were subjected to solitary confinement, threatened with stun guns and pepper spray, and beaten.³¹ Some detention facilities lack recreation areas and therefore detainees go months or years without being outside in direct sunlight; detainees report being beaten and harassed as means of coercion, and for making simple requests.³²

Detained asylum seekers are routinely denied adequate medical treatment. Immigrants in Irwin and LaSalle have been denied testing and treatment for cancer;³³ an immigrant detained in Hudson correctional facility in New Jersey was denied medication to shrink his brain tumor;³⁴ another immigrant in Stewart Detention Center reported having his clavicle bone showing through his skin and was refused treatment for

²⁸ Kim, Kyle. “Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid before Being Deported.” *Los Angeles Times*, 28 September 2017. <http://www.latimes.com/projects/la-na-access-to-counsel-deportation/>.

²⁹ “The Impact of President Trump’s Executive Orders on Asylum Seekers,” *Harvard Law School Harvard Immigration and Refugee Clinical Program*, 8 February 2017, available at: <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf> (p.2)

³⁰ Cassidy, Elizabeth & Tiffany Lynch, “Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal,” *U.S. Comm’n on Int’l Religious Freedom*, (2016): 8 <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>; “The Impact of President Trump’s Executive Orders on Asylum Seekers,” *Harvard Law School Harvard Immigration and Refugee Clinical Program*, 8 February 2017, available at: <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf> (p 6).

³¹ Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.8)

³² For instance, in Florida a detainee asked guards “to adjust the air conditioning. [G]uards [...] left the detainee with stitches.” See: “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.8)

³³ “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.8, 14)

³⁴ “Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers.” *Human Rights First*. 26 August 2016. <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>. (p. 32).

five months;³⁵ an asylum seeker in a California detention facility bled profusely from her vagina for seventeen days and was given diapers before being subject to an open gynecological exam at the detention center in which no instruction was given to her beforehand.³⁶ It is telling that the highest number of inmate deaths in the past two years have been recorded at an immigrant detention facility.³⁷ The ACLU has described the government's failure to provide medical care in detention facilities as "systemic."³⁸

5.4 Traumatized asylum seekers

Each of these factors uniquely impacts traumatized asylum seekers.

Merely being in a prison-like, hostile environment— reminiscent of many asylum seekers' past persecution— aggravates pre-existing health conditions of already-traumatized asylum seekers, and disadvantages their ability to articulate their cases in front of immigration judges. Detention conditions— particularly solitary confinement— are proven to affect even those without previous mental health illnesses, causing confusion, violent behavior, and even paranoia and hallucinations.³⁹ Medical professionals describe detention having a causal relationship with feelings of "isolation, helplessness, hopelessness and serious long-term medical and mental health consequences— even if it lasts for only a few weeks."⁴⁰ Research directly examining the effects of detention on those who have experienced past trauma consistently report that these facilities significantly increase individuals' risk of re-traumatization,⁴¹ and specifically exacerbates

³⁵ "Shadow Prison Immigrant Detention in the South," *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.14-15)

³⁶ "Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers." *Human Rights First*. 26 August 2016. <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>. (p. 32)

³⁷ LaSalle Detention Center in Louisiana has recorded the highest deaths in the last two years. See: Laughland, Oliver. "Inside Trump's Secretive Immigration Court: Far from Scrutiny and Legal Aid." *The Guardian*, June 7, 2017, sec. US news. <http://www.theguardian.com/us-news/2017/jun/07/donald-trump-immigration-court-deportation-lasalle>.

³⁸ "Fatal Neglect: How ICE Ignores Death in Detention." *American Civil Liberties Union*. February 2016. <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>.

³⁹ Grassian, Stuart. "Psychiatric effects of solitary confinement." *Wash. UJL & Pol'y* 22 (2006): 325; Silove, Derrick, Patricia Austin, and Zachary Steel. "No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia." *Transcultural psychiatry* 44.3 (2007): 359-393.

⁴⁰ Life on Lockdown "Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers." *Human Rights First*. 26 August 2016. <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>. (p. 32)

⁴¹ Cassidy, Elizabeth & Tiffany Lynch, "Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal," *U.S. Comm'n on Int'l Religious Freedom*, (2016): 44 <https://www.uscirf.gov/sites/default/files/Barriers%20to%20Protection.pdf>; also see: Storm, Tania, and Marianne Engberg. "The impact of immigration detention on the mental health of torture survivors is poorly documented—a systematic review." *Danish medical journal* 60.11 (2013).

PTSD, anxiety and depression.⁴² Detainees also self-report on the deleterious psychological impacts of detention,⁴³ while self-reporting is an imperfect metric, it is telling in this case given medical professionals' lack of access to potential patients in detention.

In a situation of tragic irony, detention facilities demonstrate a tendency to harass certain asylum seekers for the exact reasons they fled their countries. In particular, LGBT asylum seekers face higher levels of harassment (from both peers and facility staff).⁴⁴ At a time when the United States is seeing a surge in the number of asylum seekers filing cases based on sexual violence and gender-based persecution,⁴⁵ the country is also unveiling rampant rates of sexual violence in its immigration detention centers.⁴⁶

Despite that immigration detention facilities are required to provide medical care, seeking treatment for mental health concerns is a near impossibility.⁴⁷ Medical professionals have been spontaneously blockaded from holding therapy sessions, and report on facilities' negligence to provide detainees with necessary medication.⁴⁸ In other cases, detention facilities approached treating traumatized immigrants by generically prescribing medication, and over-medicating.⁴⁹ As illustration, take the following quote:

"Psych is bad. They just give you meds," said Catalina, who has been detained for

⁴² Bosworth, Mary. "Mental health in immigration detention: a literature review." *Criminal Justice, Borders and Citizenship Research Paper Series* (2016), 4.

⁴³ "Shadow Prison Immigrant Detention in the South," *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.17, 38).

⁴⁴ "Shadow Prison Immigrant Detention in the South," *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.17); Valle, Gaby del. "For LGBT Undocumented Immigrants, Detention Means More Fear and Humiliation." *Broadly*, VICE, March 17, 2017. https://broadly.vice.com/en_us/article/qvdkx3/for-lgbt-undocumented-immigrants-detention-means-more-fear-and-humiliation.

⁴⁵ "Spike in Gender-Based Violence in Central America Leads to Dramatic Increase in Asylum Caseload," *Tahirih Justice Center*. 5 April 2016. <http://www.tahirih.org/news/spike-in-gender-based-violence-in-central-america-leads-to-dramatic-increase-in-asylum-caseload/>.

⁴⁶ "Sexual Abuse in Immigration Detention." *American Civil Liberties Union*. 2017. <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/sexual-abuse-immigration-detention-0>; also see: Takei, Carl and Michael Tan & Joanne Lin, *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons*, American Civil Liberties Union, (2016), 9, 12-13, https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf.

⁴⁷ "Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention." *Human Rights Watch*, May 8, 2017. <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>.

⁴⁸ "Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention." *Human Rights Watch*, May 8, 2017. <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>.

⁴⁹ "US: Deaths in Immigration Detention." *Human Rights Watch*, July 7, 2016. <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>. (the report described psychologists within detention centers neglecting detainees, and continuously prescribing anti-psychotics, even when inappropriate).

*over eight months. “A blue and brown pill, they didn’t tell me what was in it. When I took it, I almost passed out. They don’t tell you the consequences of medication. There is no therapy – just meds.”*⁵⁰

For detainees who pose challenges to facility staff— due, in part, to underlying mental health conditions— staff respond by isolating the detainee. Psychologists indicate that this is typically the worst response to those facing mental health disorders, and can exacerbate the asylum seeker’s mental disorder.⁵¹

If an attorney representing a detained asylum seeker wishes to arrange a forensic evaluation for his client, he is at the whim of detention staff. Some institutions lack adequate or even *any* “accommodations for medical examinations” while other facilities “will often refuse entry to physicians or psychologists.”⁵² As a result, legal counsel for detained asylum seekers may find themselves expending inordinate amounts of time jumping through ill-defined hoops to arrange a forensic evaluation, amidst rapidly approaching hearing dates.⁵³

Psychological evaluations provided by the detention center (uncommon), can be problematic when offered. Medical personnel have reportedly required other detainees to serve as interpreters during the evaluation,⁵⁴ violating basic principles of privacy and threatening the ability to conduct a candid evaluation.

By mid-2017, lawmakers in California and New York dedicated state funds to expand *pro bono* services for detained immigrants. However, attorneys warn that this is an unsustainable approach, and “incremental in the long run”, given that continued funding is not guaranteed and the dearth of issues brought about by detention that compound on one another.⁵⁵

⁵⁰ “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.33)

⁵¹ Human Rights Watch reports on three cases of detained immigrants who exhibited pre-existing psychosocial disorders (including one who was suicidal) that were placed in solitary confinement. One case resulted in a death. See: “Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention.” *Human Rights Watch*, May 8, 2017. <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>.

⁵² Kim, Kyle. “Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid before Being Deported.” *Los Angeles Times*, 28 September 2017. <http://www.latimes.com/projects/la-na-access-to-counsel-deportation/>.

⁵³ Kim, Kyle. “Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid before Being Deported.” *Los Angeles Times*, 28 September 2017. <http://www.latimes.com/projects/la-na-access-to-counsel-deportation/>; (This point was also echoed by Andrew Milewski). Milewski, Andrew (M.D./PhD Candidate) (Weill Cornell Center for Human Rights). Personal Interview. 2 Nov. 2017.

⁵⁴ Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.49-50).

⁵⁵ Kim, Kyle. “Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid before Being Deported.” *Los Angeles Times*, 28 September 2017. <http://www.latimes.com/projects/la-na-access-to-counsel-deportation/>.

Detaining asylum seekers is unnecessarily expensive,⁵⁶ and private detention centers that are paid per bed only incentivizes unlawful denial of parole. Research consistently sited private detention facilities as having the worst conditions, and more frequently preventing detainees access to medical care and legal counsel. This is extremely concerning considering private detention centers' lack of oversight, and the current trend to increase use of detention as means of deterrence.

5.5 Conclusion

Immigration detention in the United States currently undermines the legal identity of asylum seekers. The country's zealous use of detention facilities regards asylum seekers foremost as "illegal" migrants, and is punitive rather than humanitarian in nature. While the INA does not grant the "presumption of credibility" to asylum seekers, its practice of detention certainly errs closer towards the presumption of disbelief. Asylum seekers experiencing trauma-related mental health disorders are forced into a situation akin to double jeopardy. Traumatized asylum seekers are penalized first for fleeing across the U.S. border (locked away with slim chance of parole or affordable bond). Second, they are penalized for their state of trauma (held in conditions that aggravate pre-existing conditions and disadvantage their ability to recover, self-advocate, and articulate an eloquent narrative in court).

The lack of accountability around detention centers' notorious use of force, coercion, and practice of medical neglect, persists amidst a political climate that increasingly relies on detaining immigrants and rushing them through legal channels. Unless an asylum seeker is among the 14 percent of detained immigrants who have access to legal counsel, advocating for one's own health and credibility can be an insurmountable task.

⁵⁶ Shadow Prison Immigrant Detention in the South," *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf. (p.11).

Chapter 6

The Way Forward

The U.S. asylum system currently violates international human rights obligations, as well as national laws (explored below). Traumatized asylum seekers throughout the country, and particularly those in detention centers, are amongst the most affected by the regime's shortcomings. This chapter presents recommendations that stakeholders must take to meet the country's legal commitments, and respect the dignity and fundamental right to asylum for the most vulnerable.

6.1 Applicable International Law

The United States has ratified the International Covenant on Civil and Political Rights (ICCPR),¹ the Convention on Torture (CAT),² as well as the 1967 Protocol Relating to the Status of Refugees,³ thereby rendering these the main sources of international law governing the United States immigration system. According to interpretations (or the texts themselves), these treaties bind states to ensure the rights within are conferred upon both citizens and non-citizens.⁴

Article 9 of the ICCPR states, "Everyone has the right to liberty and security of person."⁵ It further provides that:

¹ International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereafter referred to as ICCPR].

² *Convention Against Torture*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

³ *Protocol Relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en.

⁴ According to the Human Rights Committee— which was established by the ICCPR to provide guidance on the treaty and oversees states' compliance— rights within the ICCPR are "not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party." *See*: Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant, 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

⁵ ICCPR.

*"[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention. . . ."*⁶

The Human Rights Committee—the body established to interpret and oversee States' compliance with the ICCPR—elaborated that immigration detention must be "justified as reasonable, necessary and proportionate [. . .] [and] not be based on a mandatory rule for a broad category."⁷

As such, the United States' practice of *de facto* detention of families and children seeking asylum—particularly those with PTSD, depression, and anxiety who have expressed credible fear and signs of past trauma—fails to comply with the ICCPR. The United States' lack of re-assessment for who it detains, and arbitrary denial of parole or reasonable bond also violates this right.

The ICCPR and the CAT regulate detention conditions. Under the ICCPR, "cruel, inhuman or degrading treatment or punishment" is prohibited, and detainees must "be treated with humanity and with respect for the inherent dignity of the human person."⁸ Yet the beatings, harassment, and denial of medical care to asylum seekers in detention centers across the United States reject these basic obligations.

Article 23 of the ICCPR also provides special protection of the family unit.⁹ Guidance on this article states requires States to adopt "appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."¹⁰ The United States fails to meet these rights when detaining asylum seekers apart from their family members, as well as delaying cases in which family members remain in the asylum seeker's country of origin while his/her case is pending.

Holding asylum seekers in detention centers is a punitive measure and cannot hold water with the argument that it "protects" asylum seekers, nor justify the broad assumption that asylum seekers will abscond. Moreover, this practice violates International refugee law. In signing the 1967 Refugee Protocol, the United States is also bound by articles 2-34 of the 1951 Convention.¹¹ The Convention requires that states "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming

⁶ ICCPR, art. 9(4).

⁷ Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

⁸ ICCPR, *supra* note 84, arts. 7, 10.

⁹ ICCPR art. 23 "Protection of the family, the right to marriage and equality of the spouses"

¹⁰ General Comment No. 19 "Protection of the family, the right to marriage and equality of the spouses", 27 July 1990, para. 5.

¹¹ 1967 Protocol, Art. 1(1) The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization.”¹²

Article 16(2) of the convention states:

*“A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.”*¹³

In practice, the current system does not guarantee asylum seekers the right to counsel, and has failed to erect procedural safeguards to ensure traumatized asylum seekers are able to access counsel, the courts, and expert witnesses at the same rate as their non-traumatized counterparts.

Possibly the gravest violation yet has been the United States deportation of *bona fide* asylum seekers. With the one-year filing deadline in place— as well as a waning ability for higher courts to overturn IJ’s questionable credibility findings— the United States denies the right to asylum for families and individuals whose claims would otherwise succeed on its merits. This violates the principle of *non-refoulement*, which states that governments cannot return a person to his or her country of origin if he or she may be exposed to persecution. The principle of *non-refoulement* is considered international customary law, and therefore binding on all countries.¹⁴

6.2 Applicable Domestic Law

As discussed earlier, immigration detention centers fall into a legal no-man’s land. The governing provisions for medical treatment within detention facilities include the 2000 National Detention Standards (NDS), and the 2008 Performance Based National Standard.¹⁵ Unfortunately, the 2000 National Detention Standards were unenforceable, and therefore largely found ineffective. Consequently, the 2008 Performance Based National Standard aimed to update and improve the former set of standards. However, the new standards— which include provisions to ensure detainees’ access to mental health care— have been adopted *ad hoc*.¹⁶

¹² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Art. 31 available at: <http://www.refworld.org/docid/3be01b964.html> [hereafter referred to as the 1951 Convention].

¹³ 1951 Convention, Art 31. (emphasis my own.)

¹⁴ UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, available at: <http://www.refworld.org/docid/437b6db64.html>

¹⁵ Jeffrey, Jolena. “ICE Detainee Facility Medical Treatment.” *HEALTH LAW & POLICY BRIEF* (blog), January 5, 2015. <http://www.healthlawpolicy.org/ice-detainee-facility-medical-treatment/>.

¹⁶ Jeffrey, Jolena. “ICE Detainee Facility Medical Treatment.” *HEALTH LAW & POLICY BRIEF* (blog), January 5, 2015. <http://www.healthlawpolicy.org/ice-detainee-facility-medical-treatment/>.

However, Asylum seekers— whether detained or not— are afforded due process rights under the U.S. Constitution. Their rights are protected by the Fifth Amendment,¹⁷ which prohibits conditions “which amount to punishment without due process of law.”¹⁸ Moreover, “[t]he U.S. Supreme Court has repeatedly held that liberty interests protected by due process include [...] right to [...] medical care and adequate training of personnel required by these interests.”¹⁹

As the findings in Chapters Four and Five indicate, the United States has shown no effort to ensure traumatized asylum seekers are able to exercise their due process rights despite clear barriers that disadvantage this population.

* * *

In almost every respect, the U.S. asylum system imperils traumatized asylum seekers’ ability to seek protection from *non-refoulement*. Where trauma is a sign of past persecution, tragic irony is likely to determine the fate of an asylum seeker’s claim: she is compared against the REAL ID Act’s standards that markedly disadvantages those with psychosocial disorders; she faces a steep legal threshold to challenge negative credibility decisions in higher courts; and if she is *unable* to access adequate legal counsel who is trauma-informed and connected with forensic evaluators, her claim is subject to misinterpretation and, possibly, rejection.

The current detention practices of asylum seekers violate international and national laws in their lengthy or unreasonably expedited processing times, the barriers they present to ensure asylum seekers know and are able to exercise their rights, and their denial of mental health resources and professionals. This is particularly grave in the case of private detention centers. Such sites do not attain reasonable goals for anyone

¹⁷ *Wong Wing v. United States*, 163 U.S. 228, 242 (1896). (stating, “The provisions of the fifth, sixth, and thirteenth amendments of the constitution apply as well to Chinese persons who are aliens as to American citizens. The term ‘person,’ used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien bom, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.”) In 2001, the U.S. Supreme Court reaffirmed that all immigrants—documented or not, which would include those subject to deportation—are entitled to the due process protections of the Fifth Amendment. In *Zadvydas v. Davis*, the Court also reaffirmed a basic principle of justice with respect to detention: that arbitrary and indefinite detention is unconstitutional.

¹⁸ Domínguez, Lara and Adrienne Lee and Elizabeth Leiserson “U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis,” Allard K. Lowenstein International Human Rights Clinic, Yale Law School. 20 June 2016. Available at: https://law.yale.edu/system/files/area/center/schell/document/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf

¹⁹ Domínguez, Lara and Adrienne Lee and Elizabeth Leiserson “U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis,” Allard K. Lowenstein International Human Rights Clinic, Yale Law School. 20 June 2016. Available at: https://law.yale.edu/system/files/area/center/schell/document/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf

involved: they do not “deter” asylum seekers from coming in to the country; they frequently deny immigrants’ due process rights; they present heinous conditions that re-traumatize asylum seekers; and they operate with little relative oversight despite their reliance on people’s tax dollars to fill new bed quotas.

6.3 Recommendations for the United States Government

1. Conduct an initial trauma screening of asylum seekers when filing an application for asylum, which is to be included in the asylum seeker’s case file based on the individual’s discretion. For those who meet DSM V criteria for trauma-related disorders (PTSD, depression, and anxiety), provide a list of resources that includes contacts for treatment, forensic evaluations, and legal services.
2. Allocate funding for public lawyers to service asylum seekers, and allow asylum seekers to opt-in to a randomized selection system to receive counsel.
 - Studies show that guaranteeing the right to counsel for asylum seekers would actually save the government time and money overall.²⁰ Crucially, represented asylum cases require less time from the asylum officer or immigration judge as their cases typically come with a brief, and clearly presented case. Random assignments for counsel ensures traumatized asylum seekers are not screened out from receiving quality legal counsel.
3. Eliminate the use of private detention facilities.
 - A review of private contractors in the federal prison system demonstrated that these actors consistently failed to guarantee basic living and legal conditions for inmates, while creating perverse financial incentives within the prison pipeline.²¹ Research shows the same holds true for private contractors within the immigration detention system.²²

²⁰ Grenier, James, and Cassandra Wolos Pattanayak. “Randomized evaluation in legal assistance: What difference does representation (offer and actual use) make.” *Yale LJ* 121 (2011): 2194; Eagly, Ingrid V., and Steven Shafer. “A National Study of Access to Counsel in Immigration Court.” *U. Pa. L. Rev.* 164 (2015).

²¹ “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons,” Office of the Inspector General, Department of Justice, August 2016. Available at: <https://oig.justice.gov/reports/2016/e1606.pdf>.

²² “Shadow Prison Immigrant Detention in the South,” *Southern Poverty Law Center*, 21 November 2016, available at: https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf

4. Enforce asylum seekers' right to parole following successful credible fear screenings. When bail is necessary, ensure it is set at a reasonable price based on a percentage of an individual's income. Eliminate bail for asylum seekers who pass credible fear screenings within their first 150 days in the country; they are barred from working in the country and therefore do not have access to income.
5. Issue new guidance on the REAL I.D. Act, to account for the "demeanor" of applicants who exhibit signs of trauma. Include guidelines on mitigating factors for meeting the burden of proof for traumatized asylum seekers.
6. Issue new guidance on the REAL I.D. Act to limit the scope and application of adverse credibility determinations based on inconsistencies that are peripheral to the asylum seeker's claim.
7. Commission a body to reassess the appropriateness of using the "clearly erroneous" threshold for higher courts to review "findings of fact", as it relates to credibility determinations. Unlike other civil cases, the "trial court" (in this case, the Immigration Judge) does not have a significant advantage in assessing the applicant's credibility given the overburdened backlog in lower courts and the rushed nature of IJ hearings. Evaluate whether a lower threshold for review would better encapsulate the protectionist spirit of asylum law.
8. Issue new nationwide guidance on the one-year filing deadline to include PTSD, severe depression, and anxiety as "extraordinary circumstances" under the exceptions clause.
9. Improve access to health care for asylum seekers:
 - Provide subsidies to clinics who conduct forensic evaluation training and/or evaluations.
10. Improve mental health and trauma-sensitive training for asylum officers by including a separate mandatory training module; mandate mental health and trauma-sensitive training for Immigration Judges and ICE officers.

Appendix A

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